84-1044



No. _____

# IN THE
# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
*Appellant,*

v.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
*Appellee.*

## ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

## APPENDIX TO THE JUDISDICTIONAL STATEMENT OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

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**APPENDIX A**

**Decision 83-12-047**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| TOWARD UTILITY RATE NORMALIZATION, a Non-Profit California Corporation, *Complainant,* vs. PACIFIC GAS & ELECTRIC COMPANY, a Corporation, *Defendant.* | **Case 83-05-13 (Filed May 31, 1983)** |

ROBERT SPERTUS, MICHEL PETER FLORIO, and JOHN F. ELLIOTT, *Attorneys at Law,* and SYLVIA M. SIEGEL, *for complainant.*

PETER W. HANSCHEN, ROBERT HARRIS, and SHIRLEY WOO, *Attorneys at Law, for defendant.*

WILLIAM L. KNECHT, *Attorney at Law, for California Association of Utility Shareholders;* and ETHAN SCHULMAN and HARVEY ROSENFIELD, *Attorneys at Law, for Center for Law in the Public Interest, intervenors.*

DIANE I. FELLMAN, *Attorney at Law, for the Commission staff.*

## OPINION

### Summary

By this decision the Commission grants, in modified form, the complaint of Toward Utility Rate Normalization (TURN) proposing access to the extra space in Pacific Gas and Electric Company's (PG&E) billing envelope by consumer representative organizations for the purpose of soliciting funds to be used for residential ratepayer representation in proceedings of this Commission involving PG&E.

The decision addresses the effect of prior Commission determinations on the ownership of the billing envelope extra space; procedural issues raised by the parties; jurisdictional attacks on the Commission's authority to grant the relief requested, including constitutional issues; and the merits of the proposal.

**Introduction**

The parties and subject matter of this case are not new to us. The issue was first raised by TURN as an intervenor in the proceedings of the rate application filed by PG&E in late 1980 (Application 60153). In those proceedings TURN argued, among other things, that this Commission should find PG&E's inclusion of its publication, *Progress*, in the customers' billing envelopes to be improper because it violated the advertising standards of the Public Utility Regulatory Procedures Act of 1978 (PURPA), 16 U.S.C. Section 2601, et seq., by which PG&E was bound.[1] At the time TURN's primary concern was not how the billing envelope space should be used but preventing PG&E from using it in a way TURN believed to be illegal.

In developing its argument on this point TURN suggested certain possible legal bases for this Commission's controlling such envelope use. One was for the Commission to restrict PG&E's use based on a finding that the envelope was ratepayer property—an idea first propounded by Justice Blackmun in his dissent in *Consolidated Edison Co. v. Public Service Commission* (1979) 447 US 530, 534, N.1. (*Con Ed*).

In our decision on the application, Decision (D.) 93887 issued December 30, 1981 (as modified by D.82-03-047 issued March 2, 1982), we concluded that, as TURN asserted, we had adopted the PURPA political advertising standards, that PG&E was bound by them, and that PG&E had engaged in political advertising in the *Progress* from time to time in violation of the PURPA prohibitions. We did not adopt the

[1]The relevant PURPA sections prohibit a utility from recovering from its ratepayers any direct or indirect expenditure for political advertising.



idea that the envelope itself is ratepayer property, as TURN suggested. However, we did find that the "extra space" in the billing envelope is ratepayer property. (D.93887 as modified, Finding of Fact 58, p. 220.) We defined extra space as the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost.

Our conclusion concerning the ownership of the extra space resulted from our analysis of the unique factors which allow this issue to exist. It was clear then as it is now that envelope and postage costs and any other costs of mailing bills are a necessary part of providing utility service to the customer, so the costs are a legitimate revenue requirement which we should, and do, permit PG&E to include in the rates it collects from ratepayers. However, due to the nature of postal rates (which are assessed in increments of one ounce) extra space exists in these billing envelopes. If we regarded that extra space as the property of PG&E, then the result would be that along with PG&E's legitimate cost of mailing it would also be entitled to profit from the economic value of that extra space.[2] Such a result is inequitable because it provides PG&E with a benefit beyond the mailing expense legitimately recoverable from the ratepayers. Mindful that the extra space is an artifact generated with ratepayer funds, and is not an intended or necessary item of rate base, and that the only alternative treatment would unjustly enrich PG&E and simultaneously deprive the ratepayers of the value of that space, we concluded that the extra space in the billing envelope "is properly considered as ratepayer property". (D.93887, Finding of Fact 58, p.220.)

[2]As we stated in D.93887, there is no question that this space has value. Quantification of that value, though, is necessarily subjective and imprecise since it is dependent on a number of variables such as the nature of the insert, the identity of the beneficiary or beneficiaries of the communication and some alternative means of conveying the same information to the same people. It may also include such intangibles as the aura of goodwill created around the proponent of the message or some other party, and the increased probability that the recipient will peruse a communication enclosed with a bill over one sent separately.

We reiterated our view that such a conclusion was mandated by the equities of the situation when, in our decision in *Center for Public Interest Law and Robert L. Simmons v. San Diego Gas & Electric Company*, D.83-04-020 decided April 6, 1983,[3] we stated:

> "We have stated that the extra space belongs to the ratepayers. In so doing, we are not so much describing a traditional property right as an equity right. . . . ...we are saying that the *reason* the ratepayers pay for the billing envelopes and postage is that those costs are an expense necessary to the operation of the utility. So, what the ratepayers are legitimately paying for is the conveyance of their bills and occasional legally mandated notices. Since these documents together do not generally add up to one ounce . . . the ratepayer has paid for some empty space . . ." (P.14.)

In the present matter TURN has filed a complaint against PG&E for not permitting access to the extra space in its billing envelopes by intervenors for the purpose of soliciting voluntary donations to be used to represent residential ratepayers in Commission proceedings involving PG&E. This complaint is a response to the invitation we made in D.93887:

> ". . . We invite TURN or any other interested party to file a complaint with this Commission with a proposed solution to this 'extra' space problem. The complaint would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the 'extra space' more efficiently for the ratepayers' benefit. We caution, however, that we will not lightly adopt such an order and that the considerable First Amendment problems must be fully addressed in such complaint." (P.159(g) as modified.)

TURN's complaint lists three alternative "Consumer Advocacy Checkoff" proposals. Each alternative proposal calls for a billing envelope extra space insert, as a two-year experiment, which (1) explains the program, (2) sets forth a list

[3]This case is also known as the "UCAN" case because it proposed establishment of the Utility Consumers Action Network or UCAN.



of pending and anticipated PG&E applications and other cases likely to have a significant effect on customers' rates and services, and (3) invites voluntary donations to support advocacy by consumer organizations (identified on a check-off list by name, address, and date of incorporation) on behalf of PG&E's residential customers before the Commission. The insert would also include a return envelope for mailing donations to a central collection point for transmittal to the organization or organizations checked off on the list.

The alternatives differ from one another in the following specifics:

a. Proposal 1 would require the Commission or its designated representative, such as the Public Advisor, to produce and write the insert. Donations would be sent to the care of the Public Advisor for transmittal to the various organizations.

b. Proposal 2 is the same as Proposal 1 except that the functions assigned to the Commission or its designated representative would be performed by or under the supervision of a "blue ribbon" panel appointed by the Commission with the assistance of its Public Advisor.

c. Proposal 3 would allow only TURN to solicit donations by way of an insert, similar in format to the others, but prepared by TURN.

A prehearing conference was held on this matter before Administrative Law Judge (ALJ) Baer on August 9, 1983 in the Commission's Courtroom in San Francisco. A hearing was held in the same place before ALJ Colgan on September 12 through 15, 1983. The right to intervene was requested by two parties: the California Association of Utility Shareholders (CAUS) and the California Public Interest Research Group (Cal PIRG). Both were granted. Only CAUS actually participated in the hearing or filed briefs. The Commission Staff through the Legal Division participated by cross-examining witnesses and filing briefs.

The matter was submitted on September 15, pending receipt of one late-filed exhibit on September 21, 1983, simultaneous closing briefs due September 28, 1983 and simultaneous reply briefs ~~due~~ October 4, 1983.

**Effect of Prior Decision**

The ordering paragraphs in D.93887 did not address the extra space issue. PG&E's position is that our statements in D.93887 about the extra space are *dicta* because our discussion of ownership of the envelope space did not address third party access but was only for the limited purpose of "explaining that a value can be assessed to the 'extra' space" in the context of our determination of whether a PURPA violation existed. Therefore, PG&E concludes our statements in D.93887 about the extra space are not subject to the rules of collateral estoppel or to Public Utilities (PU) Code Section 1709 which states:

> "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

We need not decide this issue to arrive at a proper disposition of TURN'S complaint. Whether or not the rules of collateral estoppel apply to our findings and statements in D.93887 as to the ownership of the extra space, those findings and statements were made after a full hearing and opportunity to brief the issues. PG&E has not persuaded us that there is any reason to relitigate those questions at this juncture and we shall not do so. We consider findings of fact 58, 58(a), 59 and 60 of D.93887 as being final for purpose of this proceeding.

## Disputed Evidence

**PG&E Survey**

The effect of D.93887 is also important in dealing with an evidentiary matter which arose during the hearing when PG&E attempted to offer a document of over 100 pages (marked Exhibit 12) entitled "Progress: A Readership Study".



According to PG&E's offer of proof, the document would have shown that "Progress is a useful and efficient use of the billing space, that it is a valued publication received by the ratepayers, and that it has an effective conservation measure [sic] be presented." (RT 597-598) Counsel for PG&E also claimed that the document would be useful to the Commission as a basis for determining who would use the billing envelope more efficiently and effectively (generally RT 585-599). In conjunction with this exhibit, PG&E also offered questions and answers 10 through 17 of the prepared testimony of its witness, Gerald W. Sword (marked as Exhibit 11).

Counsel for TURN objected to the admission of both documents on the ground of relevancy and as improper rebuttal testimony. The objection was sustained as to both documents by the ALJ.

In its opening brief PG&E again argues that these documents properly rebut the second sentence of paragraph 11 of the complaint, which states:

> "Therefore, this use of the extra space in the PG&E billing envelope is a more effective use of the economic value of that space than that provided by the existing alternatives, i.e., the dissemination of the 'PG&E Progress' and/or the non-use of the extra space."

PG&E also argues that the ALJ'S ruling, which relied on the impropriety of the evidence as rebuttal, applied the rules of evidence and procedure" so egregiously as to deny PG&E procedural due process". (PG&E's Concurrent Opening Brief, p.16.) As a consequence PG&E requests the Commission to reopen the proceeding and accept the complete testimony of Gerald W. Sword and the study. We decline to do that. The ALJ's ruling on these two documents was proper.

PG&E's argument implies that it is necessary or appropriate to weigh the "value" of inclusion of the *Progress*—as measured by ratepayer perception—against whatever other use might be proposed for the extra space—apparently as measured by the same yardstick. In so arguing, PG&E ignores the fact that we laid that issue to rest in D.93887. We said:

"Use of the space for the *Progress* instead of some other purposes deprives the ratepayers of that 'value' which they own." (P.159b.)

Thus, while in Finding of Fact 60 of D.93887 we stated that the "most efficient means of capturing for ratepayers' benefit the full economic value of the extra space remains to be determined in a future proceeding," we made that statement in the added context of having determined that the extra space belongs to the ratepayers.

It was not our intent then, nor is it now, to involve ourselves in judging the relative merit of the speech of different factions. "It is not the content [of the *Progress*] that we are concerned with," we stated in D.93887 (p.159d).

By our statement in Finding of Fact 60 we intended to suggest to future complainants that we needed more information in order to decide in a constitutionally equitable and practical manner how to neutrally determine who should have access to the extra space and how such access should be apportioned.

Therefore, any evidence proferred for the purpose of establishing the perceived merit of the content of the *Progress* is irrelevant to this proceeding and was properly excluded.

**Thomas C. Long's Testimony**

PG&E also offered testimony of Long (Exhibit 10). TURN objected to the admission of questions and answers 5 and 6 and Table 1, and staff joined that objection and also objected to the relevance of questions and answers 7 and 8. After a great deal of oral argument the ALJ took the objections under submission pending receipt of written argument. Examination and cross-examination proceeded as if the testimony had been received.

As counsel for PG&E explained, questions and answers 5 and 6 and Table 1 are for the purpose of showing that the revenue requirement which has been allowed for bill mailing expenses has not been sufficient to cover actual costs due to



postage increases in the last several years. We find this evidence is relevant to the jurisdictional issues raised by PG&E and questions and answers 5 and 6 and Table 1 will be received. Question 7 appears to be addressed to the expertise of this witness; however, part of that answer and all of question and answer 8 go to opinion outside Long's area of expertise. Nonetheless, due to the nature of the inquiry and the extensive cross-examination which took place on these items, we think it inappropriate to delete these questions and answers since it would require a fruitless exercise in determining which part of Long's lengthy cross- and redirect-examination should also be stricken.

Long testified that amounts authorized to be collected for mailing expenses were not sufficient to cover actual costs during certain periods of time between 1971 and 1981 because postage rates rose. He concluded that since PG&E is responsible for bill mailing expense even if rates are inadequate to cover it during the future test year, PG&E "is vested with cost responsibility". This testimony does not alter our opinion regarding ownership of the extra space. Variation between amounts adopted for ratemaking and actual expenses is inevitable in test year ratemaking. It has clearly been this Commission's policy to include in rates an amount sufficient to cover all reasonable bill mailing expense. The fact that in hindsight these amounts did not precisely reflect PG&E's actual expenditures for postage during certain periods of time does not detract from that fact or justify our treatment of the extra billing envelope space as the property of the utility rather than of the ratepayers.

**Motions to Dismiss**

In addition to the substantive constitutional grounds which we address elsewhere, PG&E has also moved to dismiss the complaint on a number of procedural bases, which are discussed below.

**a. Failure to Follow the Commission's Directive in D.93887 to Discuss the First Amendment in the Complaint.**

Pointing to our invitation to parties in D.93887 to file a complaint about matters such as this one, and specifically

noting our statement that "the considerable First Amendment problems must be fully addressed in such complaint", PG&E contends TURN's complaint should be dismissed because the complaint itself does not address the First Amendment. PG&E assumes that that is what we meant to require by our statement in D.93887. While our statement might have been more artfully worded, we certainly did not intend to depart from our established practice by requiring legal argument to be part of a complaint. The complaint merely *alleges* the activity or practice which complainant believes to be improper. Legal principles applicable to the allegations are set forth in briefs or oral argument after the facts have been elicited in a hearing.

Our statement about the First Amendment was merely meant to alert any future litigants on this issue that we would not adopt any proposal unless the proceeding instigated by the complaint presented us with a record which fully addressed the First Amendment problems which such a proposal might raise. In this case, the First Amendment problems were first addressed by PG&E in its Motion to Dismiss filed prior to the hearing. The First Amendment issues were addressed further in the parties' responses to PG&E's motion and in their opening and closing briefs. Since the First Amendment problems have been fully addressed as required by D.93887, we will reject the motion to dismiss on this procedural basis.

**b. Failure to State a Cause of Action**

PG&E states that the complaint does not set forth "any act or thing done by any public utility . . . in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission . . ." as required by PU Code Section 1702, the complaint provision.

While this matter may seem to fall between the cracks when PU Code Section 1702 is applied to the facts alleged, there is a broader mandate applicable here. PU Code Section 705 states:

> "Whenever in Articles 2, 3, and 4 of this chapter a hearing by the commission is required, the hearing may be had either upon complaint or upon motion of the commission."



Such a hearing is a prerequisite to our determining whether a utility's practices are "unjust, unreasonable, unsafe, improper, inadequate, or insufficient." Based on that we then, by order or rule, fix the practices to be followed. See PU Code Section 761 (Article 3). PU Code Section 728 (Article 2), which gives us the right to "determine and fix, by order, the just, reasonable, or sufficient . . . practices . . ." to be observed should we find a utility's practices affecting rates to be "insufficient, unlawful, unjust, unreasonable, discriminatory, or preferrential . . . ," also requires a hearing.

Thus, we conclude that a complaint alleging unjust or improper practices as was filed here complies fully with statutory requirements and we will deny the motions to dismiss based on that ground.

**c. Failure to Sign Complaint**

PG&E also notes that TURN's complaint in this matter was not signed as required by Rule 4 of our Rules of Practice and Procedure (Title 20, California Administrative Code, Section 4). While this is apparently accurate, it was not noticed by our Docket Office at the time of filing. If it had been, it would have been rejected until remedied. The matter was in hearing before this technical issue arose.

The prepared testimony of the two witnesses for TURN together sponsors each allegation of the complaint. Sylvia Siegel, executive director, and Michel Peter Florio, attorney, testified extensively under oath on both direct- and cross-examination.

The purpose of Rule 4 is to guard against frivolous vexatious, harassing filings by requiring the responsible parties to attest to the allegations.

As a result of Siegel's and Florio's testimony, all the allegations have been attested to and the purpose of Rule 4 has been served. Thus we think it appropriate to invoke the equitable consideration authorized by Rule 87 which, in pertinent part, states:

> "These rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues

presented. In special cases and for good cause shown, the Commission may permit deviations from the rules. . . ."

**Other Jurisdictional Claims**

**a. The Dedication Issue**

CAUS takes the position that this Commission may not order PG&E to allow others to use billing envelope space because PG&E has not dedicated that space to public use. Since the space has not been so dedicated, CAUS asserts, the Commission lacks jurisdiction to grant the relief sought. To support this position CAUS cites our decision in *Holocard v PT&T et al.* (1981) 6 CPUC 2d 649 as corrected by D.92980; modified and rehearing denied by D.93362 (1981). *Holocard* is clearly inapposite to the present matter. That case involved a proposed business (Holocard) seeking an order requiring the utility to participate in the operation of the business to the extent of billing Holocard's customers, on Holocard's behalf. In rejecting Holocard's claim we discussed the traditional principle of dedication of utility property to public service which we have relied upon over the years. Obviously, however, where the property in question (the extra space) belongs to the ratepayer, this principle cannot be applied.

Furthermore, all the dedication cases have in common an attempt to require the utility to commence some new service. As TURN properly points out, "[t]his proceeding simply does not present a dedication question, because TURN is not requesting a new public utility service." (TURN reply brief p.33.)

TURN proposes that we order PG&E to refrain from exercising exclusive control over the extra space so that TURN and perhaps some other entities may have access to it. This is not equivalent to new utility service, it is merely a proposal for more efficient use of existing service. Such Commission action is certainly within the ambit of authority described in PU Code Section 761.



**b. Management Prerogative**

As both CAUS and PG&E note in their post-hearing briefs, the value of utility property that has been rented to others (e.g. pole space or office space) can be credited by the Commission against revenue requirements in rate setting proceedings. PG&E additionally points out that we may not, consistent with the rule set forth in *Pacific Telephone and Telegraph Co. v Public Utilities Commission* (1950) 34 C 2d 822, and other earlier cases, interfere with actual management decisions regarding the activities themselves. When the subject is utility property, that observation is generally true. However, it does not pertain to the extra space since, as we have explained, that space is *not* utility property.

Furthermore, as the case above makes clear, "[t]he primary purpose of the Public Utilities Act [citations omitted] is to insure the public adequate service at reasonable rates without discrimination." 34 C 2d 822, 826.[4] A practice which recoups the economic value of the extra space for PG&E in addition to recouping the costs of mailing discriminates against the ratepayers since it would be impossible for this Commission to credit any amount certain against revenue requirement because the value of the space might fluctuate from message to message, time to time, and customer to customer, as described in footnote 2, supra. Therefore, we reject the claim of PG&E and CAUS that we lack jurisdiction over the present matter because it constitutes improper interference with a proper management prerogative.

Relative to this management prerogative argument PG&E suggests that even if the billing envelope were public property, the case law still permits PG&E to deny access to third parties. However, in citing *Danskin v San Diego Unified School District* (1946) 28 C 2d 536; *Adderley v Florida* (1966) 385 US 39, 17 L ed 2d 559; and *Lehman v City of Shaker Heights, et al.* (1973) 418 US 298, 41 L ed 2d 770, PG&E misses the crucial point

[4]In a recent discussion of the "invasion of management" rationale in this case the Supreme Court stated: "Later cases . . . have cast serious doubt on the continuing validity of much of the reasoning in *Pac. Tel.*" *General Telephone Company of California v Publ. Util. Comm.* S.F. 24459 (filed Oct. 20, 1983), slip opinion at 12.

that it is the governmental entity in charge of the public facility which has the prerogative, under certain circumstances, to restrict access to the facility. Presumably, under this line of cases, if we had determined that the billing envelope was public property, which we have not, it would then be the Commission which had the authority to determine how access could be restricted. The conclusion that such authority would rest with PG&E is not supported by these cases.

**The Nature of TURN**

Both PG&E and CAUS argue that even if the Commission does have the right to order PG&E to make this extra space available ot others, allowing TURN such access would still be improper because TURN is not a democratically instituted organization, it is not consumer-controlled, it does not represent a clearly defined class, its claims about whom it represents are inaccurate and overstated, and it has demonstrated that it cannot be trusted to clearly and accurately describe its past role in rate proceedings.

TURN's complaint describes the organization as a

> "... non-profit California corporation ... [which] represents the interests of residential utility consumers generally, as well as specific consumer organizations and constitutencies, such as the statewide Consumer Federation of California, a federation of approximately one hundred organizations; the Consumers Cooperative of Berkeley, with a membership of approximately 90,000 families; San Francisco Consumer Action; the California Legislative Council for Older Americans; the California Gray Panthers and other organizations and individuals."

It is correct that TURN is not a membership organization with voting members who decide its policies. The testimony of TURN's executive director, Sylvia Siegel, illustrated that the organization is funded by donations and some grant funds (as



well as some PURPA awards[5] granted by this Commission). The organization's policy, however, is set by a board of directors which is comprised of representatives from at least five of the consumer organizations mentioned above.

Siegel's testimony made it clear that while there is certainly no uniformity of interests among ratepayers—even among residential ratepayers whom this proposal specifically addresses—there are many positions which TURN takes regarding PG&E that would be shared by substantially all such ratepayers. These include, she testified, a desire to keep rate of return and evaluation of rate base relatively low. As to issues such as rate design and energy conservation subsidies, Siegel testified that TURN takes positions consistent with the policy its board of directors adopts. So, for example, TURN opposed the ZIP and RCS[6] programs in Commission proceedings because TURN took the position that the programs were subsidized by the nonparticipants—primarily low-income, elderly, and renters. Obviously some residential ratepayers liked these programs; however, it must be acknowledged that TURN's position represented the interests of a significant group of such ratepayers.

We are unpersuaded by arguments that TURN's claims about itself are so inaccurate as to cast doubt on its veracity. TURN has demonstrated in its testimony and in past participation in proceedings before this Commission an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population. It has also demonstrated that it is a properly constituted nonprofit California corporation, and

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[5]The Commission has adopted rules (see California Administrative Code, Title 20, Section 76.01 et seq.) pursuant to PURPA, the Public Utility Regulatory Act of 1978, which provide for the award of reasonable attorneys' fees, expert witness fees, and other reasonable costs to consumer participants in certain hearings involving electric utilities. In order to be eligible for such award the consumer must demonstrate, among other things, significant financial hardship. TURN has received such awards within the past two years, most recently in D.83-05-048 issued May 18, 1983.

[6]ZIP or Zero Interest Program and RCS or Residential Conservation Service are programs under which the utility made no-interest loans to ratepayers for certain home conservation devices and conducted free energy conservation audits of ratepayers' homes.

that it is presently involved in Commission proceedings involving PG&E. Furthermore, it has adequately demonstrated during this hearing that it cannot participate in all the regulatory proceedings of PG&E it might otherwise participate in without significant financial hardship.

**Merits of TURN's Proposals**

As noted above, TURN proposes that the extra space in the billing envelope be used in one of three ways. PG&E and CAUS oppose all of TURN's proposals on the grounds that they are unworkable and ill-conceived. Our Legal Division supports TURN's complaint and recommends that we adopt proposal 3. It believes the proposals 1 and 2 would require excessive Commission involvement and that there is insufficient evidence to adopt these proposals at this time.

Before addressing the merit of TURN's proposals, we note that in other decisions we have recognized the value of effective participation by consumer organizations in Commission proceedings. In our UCAN decision, for example, we stated that participation by consumer groups tends to enhance the record in our proceedings and complements the efforts of our Commission staff.

Based on the evidence and arguments presented in this proceeding, we believe that, in general, TURN's proposals are meritorious. Under each proposal, residential ratepayers in PG&E's service territory would be given an opportunity to be informed of and to support advocacy efforts on their behalf through use of the extra space in the billing envelope. We believe that this would be an appropriate and efficient use of the extra space.

With respect to the specific variations offered by TURN, we believe that it would be premature for us to adopt proposals 1 or 2 at this time. These proposals envision a number of qualified consumer organizations participating in the checkoff program. The organizations would be listed on the materials inserted in the envelope, receive monies contributed by ratepayers, and share in program expenses. To date, however,



TURN is the only organization which has sought access to the PG&E billing envelope. Thus, it would be the only organization participating in the checkoff program for an indefinite period of time. Under these circumstances, we believe that the mechanisms outlined in proposals 1 and 2 are neither necessary nor practical at this time.

While we are not adopting proposals 1 or 2 in this proceeding, we are not foreclosing the adoption of similar proposals in the future. Indeed, a checkoff mechanism whereby ratepayers can select among a number of qualified consumer organizations may be both necessary and desirable in situations where more than one organization has sought access to the envelope. We agree with TURN that an essential element of such a mechanism is the development of neutral criteria to determine eligibility.

In this case, we will follow our Legal Division's recommendation and order that proposal 3 be implemented with some modification. We will require PG&E to give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E will be permitted to continue to insert the *Progress* during the remaining months.

In this regard, the fact that the extra space is ratepayer property does not affect the fact that PG&E's ability to communicate with its customers also is or may be a beneficial use of that space. Our goal, as expressed in D.93887, is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E. Implicit in this assumption, of course, is the ongoing availability of PG&E's views. Currently, no controls are placed on the content of the *Progress* and we will not undertake to control the material inserted by TURN.

We will establish certain requirements to ensure that the process works smoothly. First, priority must be given to the billing and legally-mandated notices to customers. If TURN is prevented from inserting its material during any month because

of this priority, it shall be allowed access during another month. This alternate month shall be at TURN's choosing. Otherwise, TURN shall be bound by the schedule discussed below.

Second, TURN shall reimburse PG&E for any costs the company incurs beyond its usual cost of billing that directly result from the addition of TURN's material. Similarly, shareholders should bear costs associated with inserting the *Progress*. We note that currently such costs are not separated from other costs of preparing the billing envelope and are not treated below the line for ratemaking purposes. This practice should cease and all identifiable costs should be assigned to shareholders. We believe that these costs are minimal.

Third, all of TURN's bill insert material should clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission.

Fourth, funds received by TURN from the bill insert process shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E.

Fifth, TURN will be required to establish an adequate mechanism to account for the receipt and disbursal of funds received through the bill insert process.

Sixth, we will require TURN to prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process. The report should describe TURN's efforts on behalf of PG&E's residential ratepayers in the past year. It should also include a statement audited by a certified public accountant stating the amount received by TURN from ratepayers through the insert process and how the funds were spent to advance the interests of ratepayers. The first report should be distributed on or before February 1, 1985 and should cover calendar year 1984. A second report should be distributed one year later. Copies of TURN's reports should be filed with this Commission within five days of distribution.

Our order today does not cover every possible contingency. Therefore, in addition to complying with the requirements set forth above, we expect PG&E and TURN to work together in



good faith to overcome problems. If insurmountable problems arise, we may have to issue further clarifying orders. We hope this will not be the case. We want the program to work and we want the parties to make it work.

Actual insertion of TURN's material shall commence 30 days after TURN files a notice with this Commission indicating that an adequate mechanism has been established to account for the receipt and disbursal of all contributions received through the insert process. TURN should describe the mechanism in its notice. The notice should also identify the months over the next two years during which TURN plans to utilize the extra space. Both PG&E and TURN will be bound by this schedule.

Our action today should not be viewed as restricting access to TURN. The adoption of this proposal in no way precludes other proposals from being considered. Should other proposals be brought before us, we will consider the feasibility and benefits of each at that time. If we find that these proposals are meritorious, we could order that extra space be made available for the new program along with any previously authorized ones. Alternately, we could modify today's decision to provide for the implementation of a checkoff program as discussed above. This is consistent with the approach adopted in our UCAN decision.

**Constitutionality of Commission Regulating the Use of the Billing Envelope Extra Space**

Although we have already stated that the question of who owns the extra space should not be relitigated in this proceeding, we are also mindful that the constitutional arguments which PG&E (and to a lesser extent CAUS) has raised are jurisdictional in nature. Therefore, despite our conviction that the issue was properly determined in D.93887, we address below the constitutional claims made by PG&E. Four such claims were made: that the First Amendment to the United States Constitution prohibits the Commission from regulating envelope use; that the First Amendment prohibits the Commission from requiring PG&E to distribute the message of others; that TURN's proposal violates the equal protection provisions

of both the United States and State constitutions; and that TURN's proposal constitutes an unlawful "taking" of property under the Fifth and Fourteenth Amendments to the United States Constitution.

**a. Regulation of Use of the Extra Space by the Commission**

The most basic opposition to the Commission's adoption of TURN's proposal is grounded in PG&E's claim that the First Amendment to the United States Constitution deprives us of jurisdiction over the regulation of the use of the billing envelope extra space.

The pivotal cases on this issue are *Consolidated Edison Co. of New York v Public Service Commission of New York* (1980) 447 US 530 *(Con Ed)* and its companion, *Central Hudson Gas & Elec. Corp. v Public Service Commission of New York* (1980) 447 US 557 *(Central Hudson)*. These cases both involved attempts by our analogue in New York, the Public Services Commission (PSC) to prevent utilities from including certain kinds of inserts in its billing envelopes. *Con Ed* involved political advertising in support of nuclear power. *Central Hudson* involved advertising promoting the use of electricity. The U.S. Supreme Court found that each of these types of expression was protected by the First Amendment.

While PG&E claims that the TURN proposal violates all the constitutional standards for First Amendment regulation, we believe that even assuming these tests are applicable, all those standards have been met by the proposal version we adopt here.

**1. Time, Place, and Manner Restriction**

The court in *Con Ed* specifically held that it had long recognized

"... the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication." 447 US at 535.



The court made it clear that such regulation "may not be based upon either the content or subject matter of speech." 447 US at 536. Assuming for argument that PG&E has some property right in this extra space, the proposal which we adopt here would be a "reasonable time, place, or manner" restriction in that it requires PG&E to share the extra space with TURN. Our order also leaves PG&E with "ample alternative channels for communication." Indeed, PG&E is allowed to use the extra space to communicate to ratepayers two-thirds of the time over the next two years. However, the restriction does not impinge on the content or subject matter of PG&E's messages. Therefore, the proposal as adopted meets this standard.

**2. Permissible Subject Matter Regulation**

PG&E claims that the TURN proposal requires the Commission to indulge in impermissible subject matter regulation in that it asks the Commission to find that the proposed use of the billing envelope is a better use than PG&E's present use of the billing envelope. In effect, PG&E asserts, TURN is asking the Commission to "evaluate the contents and purpose of its proposed message, versus the contents of PG&E printed materials." (PG&E's Motion to Dismiss, p.16) PG&E mischaracterizes TURN's proposal. The proposal does not require the Commission to look at content at all. It only attempts to respond to our invitation for suggestions on how to use the economic value of the extra space more efficiently for the ratepayers' benefit. To the extent that the proposal as adopted restricts PG&E's use of the extra space, it does so on the ground that the space belongs to the ratepayers, not on the basis of the content. In any case, the proposal as we adopt it is neutral as to content of the parties' messages and, therefore, meets this subject matter standard.

**3. Narrowly-tailored Means of Serving a Compelling State Interest**

As PG&E asserts, when a party advocates that the State regulate a fundamental right, such as PG&E's First Amendment right to speak, there must be a demonstrable compelling State interest for such regulation. See, for example, *Louisiana v*

*NAACP* (1961) 366 US 293. 6 Legal Ed 2d 301 cited by PG&E. In that case the Supreme Court in a 5-page decision found unconstitutional two Louisiana statutes, one of which required certain organizations to file annual affidavits that the officers of their foreign affiliates were not members of subversive organizations, and the other of which required the organization to file a list of the names and addresses of all its members and officers in the State. The court held that such governmental regulation violated First Amendment guarantees because it could have the effect of stifling, penalizing, or curbing "the exercise of First Amendment rights", and was thus not narrowly enough drawn to "prevent the supposed evil" it was meant to prevent. (366 US at 297.)

In the present matter a compelling State interest in regulating the use of the extra space has been demonstrated and the TURN proposal as we adopt it does regulate that use in a constitutionally permissible way.

The compelling State interest is one we set forth in our *UCAN* decision:

> "The State interest, of course, is the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." (D.83-04-020 at p.17.)

The fact that we have adopted a shared approach to use of the extra space surely exhibits the "narrowly-tailored means of serving a compelling state interest" that the *Con Ed* court contemplated.

Of course this issue only arises where the governmental entity is restricting some right that the party in question possesses. Here, PG&E claims that the right is the right to speak through unregulated use of the extra billing envelope space. As we have reiterated many times now, since that space is not the property of PG&E in the first place, it has no right to use the space for First Amendment purposes.



**Distributing the Message of Another**

PG&E cites, among others, the cases of *Wooley v Maynard* (1977) 430 US 705 and *Miami Herald Publishing Co. v Tornillo* (1974) 418 US 241 for the clear proposition that the First Amendment right to free speech also includes the right to refrain from speaking and the right not to be compelled by government to publish that which one does not wish to publish. PG&E contends that each of these rights is breached if we order it to permit access by another to the extra space in its billing envelopes and allow messages of those entities to be carried in that extra space.

This argument, of course, again assumes that we are asking PG&E to publish the messages of TURN or others. In fact, as we explained above, we are simply ordering PG&E, which has physical control over the extra space belonging to the ratepayers to make it available. We are not asking PG&E to publish anything as its own. In fact, in order to protect against the possibility that one receiving a PG&E billing envelope would assume all its contents were generated by the utility, we will require that all of TURN's bill insert material clearly identify TURN as its source and state that their contents are not endorsed by PG&E.

In addition to ordering PG&E to make the space available we are also ordering it to do one thing further, and that is to use its equipment to put the inserts of others into the billing envelope extra space. We do not believe that this act is equivalent to publication. It is merely a requirement clearly within our statutory authority to regulate the practices of the utility. Of course, we will require that TURN pay to PG&E all costs which PG&E incurs beyond its normal billing costs. We have chosen this method of inserting these messages over any other because it appears to be the one which will result in the lowest cost to the ratepayers as well as the least disruption to the utility's billing process.

Distribution of the message here is incidental to the right of the ratepayers to use the extra space. We conclude that these circumstances do not violate the First Amendment protections against being required to publish the statements of others.

**Equal Protection**

PG&E claims that TURN's proposal violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and the equal protection provision of the California Constitution at Article I, Section 7, because (1) the consumer advocate is given a preferred position vis-a-vis the utility; (2) consumer advocate groups representing residential ratepayers are treated differently from consumer advocate groups representing nonresidential ratepayers; (3) the Commission is forced to draw distinctions, even among residential consumer advocate groups, between those who meet the criteria of technical competence and those who do not (see PG&E's Motion to Dismiss, p.31). PG&E's argument implies that because a fundamental constitutional right is involved—First Amendment freedom of speech—the Commission must show a compelling state interest for discrimination of the sort described. We have already described that state interest above.

We believe TURN's proposal, as we have adopted it, furthers this interest by assuring more complete ratepayer understanding and participation in energy issues involving their utility. Furthermore, the discrimination alleged does not exist. First, the proposal as we are adopting it permits TURN and the utility to share the extra space. Secondly, no other ratepayer organizations have sought access to the extra space. As discussed above, nothing in the proposal as we are adopting it prohibits others from seeking access too.

We therefore perceive no equal protection violations.

**Taking of Property**

Additionally PG&E propounds the argument that use of the extra space in the billing envelope by others constitutes either a taking of private property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution or a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments.



Again, the argument rests on PG&E's continued contention that the entire billing envelope, including the extra space, is its private property. Based on this, PG&E distinguishes the circumstances of its billing envelope from the case of *Pruneyard Shopping Center v Robins* (1980) 447 US 74, 64 L ed 2d 741, which upheld an interpretation of the California Constitution's provisions regarding free expression and petition requiring the owner of a shopping center to permit students to distribute literature and seek support for their petitions. The U.S. Supreme Court found that this interpretation did not amount to a taking under the Fifth or Fourteenth Amendments. PG&E points to the fact that the Supreme Court emphasized that the shopping center differed from other private property in that by choice of its owner it was not limited to the owner's personal use, but was "open to the public to come and go as they please". (Id p.87).

We note, however, that, in context, this observation of the court was used to explain that: "The views expressed by members of the public . . . thus will not likely be identified with those of the owner." (Id p.87.) We are adopting a similar safeguard by requiring that TURN clearly identify its material and state that it has been neither reviewed nor endorsed by PG&E. So, even if the billing envelope were regarded as PG&E's private property, the distinction cited by PG&E is irrelevant.

PG&E also cites the California Supreme Court's decision in *Pacific Telephone and Telegraph Co. v Public Utilities Commission* (1950) 34 C 2d 822 as support for its conclusion that no ratepayer property rights can devolve from ratepayer payment of bill mailing expense. PG&E cites the court's quotation from a 1913 case where it states:

> ". . . And, finally, it may not be amiss to point out that the devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public so as to justify, under the exercise of police power, the taking away of the management and control of the property from its owners without compensation, upon the

ground that public convenience would be better served thereby . . ." (Id pp.828-829 quoting *Pacific Telephone Etc. Co. v Eshleman* (1913) 166 C 640, 665.)

We think PG&E's reliance on this language is misplaced. The very central point PG&E ignores here is that the extra space is *not* "property held by [PG&E] in ownership". It is an artifact which the ratepayers have paid for and which is extraneous to the provision of a bill.

PG&E also cites *Board of Public Utility Commissioners v New York Telephone Co.* (1926) 271 US 23, 70 L ed 808 for the proposition that ratepayers cannot acquire any interest in the property "used for their convenience". (271 US at 32.) That case, however, had to do with a Commission requiring a utility to set rates at a rate that was conceded to be less than projected costs in order to make up for high returns in a previous year. The court's final statement explains the context in which it discussed ratepayer property rights:

> "The property or money of the company represented by the credit balance in the reserve for depreciation cannot be used to make up the deficiency [between actual return and conceded expense]."

The Supreme Court was clearly not prohibiting ratepayers from having property rights in objects associated with the utility's enterprise, rather it was stating that a Commission could not treat the utility's accounts as if they belonged to the ratepayers who contributed the money to them by paying for service. This concept has no bearing on the one now before us.

Finally, even assuming that the envelope is private property, it must not be forgotten that PG&E is a monoply utility closely regulated by this Commission pursuant to authority derived from this State's constitution. Article XII, Section 4, states:

> "The commission may fix rates, *establish rules*, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction." (Emphasis added.)



Section 5 states:

> "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission . . ."

And the Legislature has enacted PU Code Section 701, which states:

> "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

This constitutional and statutory authority provides sufficient basis for a determination by the Commission that PG&E must make the billing envelope available to its ratepayers, or to representatives of those ratepayers.

However, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has in the past *treated* as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious.

**Findings of Fact**

1. This Commission determined in D.93887 as amended that the extra space in PG&E's billing envelopes has economic value, and that the economic value was created by the ratepayers.

2. Quantification of the economic value of the extra space is subjective and imprecise because it is based on many variables.

3. This Commission determined in D.93887 as amended that the 'extra space' in PG&E's billing envelopes belongs to the ratepayers.

4. This Commission determined in D.93887 as amended that PG&E was itself reaping the economic value of the extra space and by such use was depriving the ratepayers of that value.

5. This Commission in D.93887 declined to order PG&E to take any action to remedy the inequity created by its use of the extra space and the deprivation of the value of that space as to the ratepayers because the record was insufficient for the Commission to determine how the Commission could direct PG&E to use the extra space more efficiently for the ratepayers' benefit.

6. In D.93887. this Commission issued an invitation to TURN or any other interested party to file a complaint with the Commission which would expand the record, especially addressing First Amendment problems, so that the Commission might issue an appropriate order to PG&E regarding how it should use the extra space more efficiently for the ratepayers' benefit.

7. By the present complaint TURN complied with the Commission's invitation in D.93887.

8. TURN's complaint lists three alternatives for utilization of the extra space by itself and possibly other residential consumer advocacy organizations.

9. First Amendment issues were addressed by the parties in written briefs and motions filed with the Commission.

10. At the hearing TURN moved to strike questions and answers 5 and 6 and Table 1 of Exhibit 10, the testimony of PG&E's witness, Thomas C. Long. Staff moved to strike questions and answers 7 and 8 of the same witness. The ALJ took the motions under submission.

11. At the hearing TURN objected to the introduction of PG&E's Exhibit 12, a document entitled "Progress: A Readership Study" and also objected to questions and answers 10 through 17 of Exhibit 11. the prepared testimony of PG&E's witness. Gerald W. Sword. on the same subject. The ALJ sustained the objection.



12. PG&E requests that the hearing be reopened to permit receipt of the excluded part of Exhibit 11 and Exhibit 12.

13. At the hearing PG&E moved to dismiss for failure of TURN to allege a violation as required by PU Code Section 1702. The motion was denied by the ALJ.

14. PG&E moved to dismiss for TURN's failure to address First Amendment problems in the complaint itself, claiming that this was required by this Commission's mandate in D.93887.

15. PG&E moved to dismiss for TURN's failure to sign the complaint as required by Rule 4 of the Commission's Rules of Practice and Procedure.

16. CAUS claims this Commission lacks jurisdiction over this matter because PG&E has not "dedicated" the billing envelope space to public use.

17. PG&E and CAUS both claim this Commission lacks jurisdiction over this matter because it would interefere with a proper management prerogative.

18. PG&E argues that this Commisssion is forbidden by the First Amendment from regulating the use of the billing envelope or requiring PG&E to distribute the messages of third parties.

19. PG&E claims that TURN's proposal would violate the equal protection provisions of both the United States and State Constitutions (Fourteenth Amendment and Article I, Section 7, respectively).

20. PG&E claims that TURN's proposal would constitute a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

21. TURN has demonstrated to this Commission an ability to represent a substantial group of ratepayers in Commission proceedings involving the service or rates of PG&E. Further, TURN has demonstrated that it is a properly constituted non-profit California corporation, that it is presently

involved in Commission proceedings involving PG&E and that it cannot participate in all PG&E proceedings it might otherwise participate in without significant financial hardship.

22. Proposals 1 and 2 envision the participation of a number of consumer organizations.

23. To date, TURN is the only organization which has sought access to the PG&E billing envelope.

24. Costs associated with inserting PG&E's *Progress* are not separated from other costs of preparing the billing envelope and are not treated below the line for ratemaking purposes.

**Conclusions of Law**

1. This Commission's findings on the issue of ownership of the extra space in PG&E's billing envelope in D.93887 as modified should not be relitigated in this proceeding.

2. Findings of Fact 58, 58(a), 59 and 60 of D.93887 as modified should be considered final for the purpose of this proceeding.

3. Objection to the testimony of Thomas C. Long is properly overruled. The testimony should be received.

4. The ALJ's sustaining of the objection to the introduction of all of Exhibit 12 and questions and answers 10 through 17 of Exhibit 11 was proper and the request to reopen should be denied.

5. PG&E's motion to dismiss for failure to allege a violation as required by PU Code Section 1702 was properly denied by the ALJ.

6. The motion to dismiss for failure to address the First Amendment problems in the complaint itself should be denied.

7. The motion to dismiss for failure to sign the complaint as required by Rule 4 of our Rules of Practice and Procedure should be denied.

8. The "dedication" concept does not affect the Commission's jurisdiction over this matter.



9. The Commission's assertion of jurisdiction over this matter does not interfere with a proper managment prerogative.

10. The First Amendment to the United States Constitution does not deprive this Commission of its ability to regulate the usage of the billing envelope or to require PG&E to distribute the messages of third parties.

11. The TURN proposal as implemented by this decision does not violate the equal protection provisions of either the United States or California constitutions.

12. The proposal as implemented by this decision does not constitute a taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

13. TURN's access to PG&E's billing envelope should be contingent on its filing with the Commission notice indicating that an acceptable mechanism has been established to account for receipt and disbursal of all funds obtained through billing envelope solicitation and the months over the next two years TURN plans to insert materials.

14. Proposals 1 and 2 should not be adopted at this time.

15. Proposal 3 should be adopted as modified in this decision.

16. Adoption of proposal 3 as modified should not foreclose the implementation of future meritorious proposals.

**ORDER**

IT IS ORDERED that:

1. The complete testimony of Thomas C. Long, taken under submission at the hearing subject to legal argument, is received in evidence.

2. The Administrative Law Judge's (ALJ) exclusion of Exhibit 12 and questions and answers 10 through 17 of Exhibit 11 is affirmed and the request to reopen the hearing to receive this evidence is denied.

3. The ALJ's denial of Pacific Gas and Electric Company's (PG&E) motion to dismiss for failure to comply with Public Utilities Code Section 1702 is affirmed.

4. PG&E's motion to dismiss for failure of Toward Utility Rate Normalization (TURN) to address, in the complaint itself, the First Amendment problems is denied.

5. The complaint of TURN is granted to the following extent:

(a) PG&E shall give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E shall be permitted to use the extra space during the remaining months.

(b) PG&E and TURN shall each determine the content of its own material.

(c) Priority shall be given to the billing and legally-mandated notices to customers. If TURN is prevented from inserting its materials during any month because of this priority, it shall be allowed access during another month. This alternate month shall be at TURN's choosing.

(d) Costs of inserting materials in the extra space shall be borne by the sponsor of the materials. PG&E shall bill TURN for all reasonable costs the company incurs beyond its usual cost of billing that result from the addition of TURN's materials. Costs associated with inserting the *Progress* shall be separated from other billing costs and assigned to shareholders.

(e) All of TURN's material shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission.

(f) Funds received by TURN from the bill insert process shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E.



(g) TURN shall establish an adequate mechanism to account for the receipt and disbursal of all funds received through the bill insert process.

(h) TURN shall prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process. The report shall describe TURN's efforts on behalf of residential ratepayers in the past year and include a statement audited by a certified public accountant stating the amount received by TURN from ratepayers through the insert process and how the funds were spent to advance the interests of ratepayers. The first report shall be distributed on or before February 1, 1985, and cover calendar year 1984. A second report shall be distributed one year later. An original and 12 copies of TURN's reports shall be filed with the Commission's Docket Office within 5 days of distribution.

(i) Actual insertion of TURN's materials shall commence 30 days after TURN files a notice with this Commission indicating that an adequate mechanism has been established to account for the receipt and disbursal of all funds received through the bill insert process. TURN shall describe the mechanism in the notice. The notice shall also identify the months over the next two years during which TURN plans to access the extra space in the billing envelope. Except for the provisions of subparagraph (c) above, both PG&E and TURN shall be bound by the schedule in this notice.

This order becomes effective 30 days from today.

Dated December 20, 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
*President*

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
*Commissioners*

I dissent in part.

/s/ VICTOR CALVO
*Commissioner*

I dissent.

/s/ WILLIAM T. BAGLEY
*Commissioner*



COMMISSIONER VICTOR CALVO, concurring and dissenting in part,

Today's decision represents a significant step towards broader public participation in our proceedings. The use of the extra space in the billing envelope by organizations representing residential ratepayers can only enhance the decision-making process.

Along with my three colleagues, I fully concur that the value of the extra space which remains in the billing envelope ought to inure to the benefit of the ratepayer. Likewise, I fully concur that providing access to the billing envelope to an organization like TURN is desirable. I also anticipate that the same high quality of performance from TURN will prevail in its use of the billing envelope.

Having said this, I feel compelled to dissent in part from the adopted decision. I do so because I have serious reservations about the procedures adopted in the decision rather than the substance of the decision itself.

Specifically, I am troubled by three aspects. First, the decision gives TURN access to the billing envelope four times a year for the next two years. Although TURN is required to file an annual report with the Commission, I would have preferred a procedure which would have established a complete Commission review of the entire experiment after one year. A year's experience would have allowed this Commission to make valuable comparisons of this proposal and the UCAN experiment. At the end of a year's time we would also have been afforded the opportunity for a full review and a complete evaluation of these programs. My concern is that the decision does not formally allow the Commission a realistic opportunity to review the experiment until after a full two years have passed. While I recognize that the Commission may reopen this proceeding at any time, the expectation we have created by this decision is that we should not need to do so until the two years have elapsed. I am not comfortable with this approach.

The second aspect which concerns me is that there is no formal creation of a panel or board to resolve disputes which are likely to arise between TURN, or any other representative group, and PG&E. I would have preferred for our order to have directed PG&E and TURN to establish an arbitration-type panel, perhaps consisting of one member each from PG&E and TURN, and a third member chosen by both. By creating an arbitration panel, there would be an incentive on the part of both parties to tailor the ratepayer-sponsored bill inserts in a manner that would encourage greater accuracy of content and also eliminate controversy, thus better serving the ratepayer.

The last aspect which concerns me is that the decision does not sufficiently emphasize that TURN is not to be given exclusive access to the billing envelope. I strongly believe that any other organization meeting the criteria set forth in our decision should be afforded access equal to that given TURN and that there be specified a precise and relatively simplified method for Commission review and decisionmaking.

For all of the reasons set forth above, I concur and dissent.

/s/ VICTOR CALVO

Victor Calvo
*Commissioner*

December 20, 1983
San Francisco, California



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**Decision 83-12-047**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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|---|---|
| TOWARD UTILITY RATE NORMALIZATION, a Non-Profit California Corporation, *Complainant,* vs. PACIFIC GAS & ELECTRIC COMPANY, a Corporation, *Defendant.* | **Case 83-05-13 (Filed May 31, 1983)** |

**DISSENT OF COMMISSIONER WILLIAM T. BAGLEY**

December 29, 1983

WILLIAM T. BAGLEY, Commissioner, Dissenting:

The Commission majority would create a ratepayer property right, equitable in nature, in the surplus space (i.e., unused postal weight allowance) of billing envelopes mailed to customers by the Pacific Gas and Electric Company. The Commission's acknowledged premise is that such unused space has economic value (which could be sold) and that such value is contributed to and thus created by the utility ratepayer.[1]

The conclusion in this proceeding, flowing from such premise, is that a single entity representing ratepayers (TURN) is clothed with a property interest in and is thus granted the right to use this "extra space" in four of the monthly billings per year and, by so doing, to preempt and supplant the otherwise constitutionally protected rights of the defendant.[2]

As admirable as the intent may be and as helpful to this Commission and to the ratepayer as the TURN organization is, the majority thus embarks upon a legal journey which reduces itself to an absurdity. Further, basic free speech constitutional rights would be overridden by this question-begging creation of the equitable right in question. In that context, this is a very illiberal decision.

This decision comes complete circle in its rationale and also in its attempt at an evolutionary creation of an equitable-

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[1] *Pacific Gas and Electric Co.* (1981) ___Cal.P.U.C.2d___, Decision (D.) 93887 (as modified by D.82-03-047 issued March 2, 1982), "We think there are or may be many other uses for the 'extra' space. That such space could be sold to public advertisers (without any extra postage costs) at once demonstrates that the space surely has value. That economic 'value' belongs to the ratepayers, who create the space by paying for the envelope and postage." (Mimeo at p. 159b.) See related Findings of Facts 58, 58a, and 59. (Mimeo at pp.220-221.)

[2] "We will require PG&E to give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E will be permitted to continue to insert the *Progress* during the remaining months." Further, "It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views...." (Majority opinion at p.23). It is reasonable to state that this last sentence demonstrates the unconstitutional rationale of the majority opinion. "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison v. Public Service Commission* (1980) 447 U.S. 530, 538 (62 L.Ed.2d 319, 100 S.Ct. 2326).



type property right. Its ostensible ingenuity is only surpassed by its legal illogic. Seemingly taking a cue from the early English High Court of Chancery and finding no remedy at law (i.e., constitutional and statutory authority), and also finding First and 14th Amendment obstacles, it creates an *in personam* right to speak forthcoming from a "property" right. It thus would obviate all constitutional questions.

This rationale attempts to follow some early equitable principles and at the same time begs the question at issue—whether this Commission has constitutional and statutory powers to order this procedure. This is made evident and obvious by the decision's limited two page (pp. 15, 38) discussion of statutory authority and the extensive discussion of the ostensible equitable right.

That such statutory powers of this Commission are limited is the subject of the recent California Supreme Court decision in *Consumers Lobby Against Monopoly v. Public Utility Commission* (1979) 25 Cal.3d 891 (160 Cal. Rptr. 124, 603 P.2d 41). The Court there commented upon both equitable and statutory (Sections 701 and 728 of the Public Utilities Code) powers. The lead opinion stated that the Commission's statutory powers did not extend to awarding attorneys fees, and that its equitable powers only applied in quasi-judicial reparations cases but not in quasi-legislative ratemaking proceedings. (At pp. 909-910.) "TURN's theory [of public participation costs] cuts far too broadly . . . and and the *consequences of such an interpretation would go far beyond the circumstances presented in this case.*" (Emphasis added). (At p. 911).

That latter quotation of our Supreme Court could not be more appropriate in this instant matter. What is this illusory equitable right which would be created and how far would it extend? Is it a constructive trust based on some type of wrongdoing or mistake or perhaps a resulting trust based upon implied intent? Can there be, in California, any type of trust not based upon statute? (*McCurdy v. Otto* (1903) 140 Cal. 48, 73 P. 748.) Or is it an equitable lien which if not imposed would result in unjust enrichment? (Restatement of Restitution, Section 161.) Perhaps its basis is Henry VIII's Statute of

Uses (1536), the central provision of which according to Maitland was "the declaration that where ever one was seised to the use of another, he who had the use should be deemed to have a legal estate corresponding to the interest he had in the use." (J. Cribbet, C. Johnson, Cases and Materials on Property, (4th Ed. 1978) p.297. But the statute of uses has no application under California law. (*Estate of Fair* (1901) 132 Cal. 523, 60 P. 442.)

Regardless of source, what are "the consequences beyond the circumstances presented in this case"? The face of every utility-owned dam, the side of every building, the surface of every gas holder rising above our cities, and the bumpers of every utility vehicle—to name just a few relevant examples—have "excess space" and "economic advertising value". Some utility corporations place bumper-strip messages on their vehicles. Buses and trucks regularly carry advertising messages. In the words of the majority at page 23 of the decision, "It is reasonable to assume that the ratepayers will benefit from exposure to a variety of views . . . ." Is it the postulate of this Commission, flowing from the decision's stated premise, that any three Commissioners at any time might decide that ratepayers would benefit from exposure to some particular socially desirable message from some ratepayer group making use of any or all such areas of excess valuable space? Could the Gun Owners of California, Inc., headed by a politically-active State Senator, convince three future members of this Commission that it should be allowed to promote wood-cutting and wood burning messages to ratepayers as a fuel conservation aspect of the group's espoused rural ethic? And then use that "excess space" message to raise funds to be used by it on behalf of ratepayers. Similarly, the Sierra Club, by a finding of three Commissioners, after an on-the-record proceeding, could be said to represent the conservation interests of ratepayers in ratemaking cases and thus, also, be allotted some of the excess space for recruiting and fund-raising purposes.

And once established as a right, perhaps ultimately *in rem* rather than in the *ad hoc, in personam* method here established, is the right subject to defeasance? Will there not be writs of mandate entertained to protect this established property right in



the valued excess space? Of interest, see *Sierra Club v. Morton* (1972) 405 U.S. 727 (92 S.Ct. 1361) which affirmed the Circuit Court and held against plaintiff's standing to sue:

> But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so. (At p. 739)

This dissent need not elaborate on the freedom of speech issue which permeates this proceeding. It is sufficient to refer to *Consolidated Edison v. Public Service Commission* (1980) 447 U.S. 530, 537 where the Supreme Court states:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

But it should be specially noted that this very same Commission, with three of the present majority sitting and without dissent recently stated in *Frankel v. Pacific Gas and Electric Company* (1982) ____Cal.P.U.C.2d____, D.82-07-009 at mimeo p.3:

> We have ruled that while we may disallow advertising expenses [to be charged to ratepayers] which we will find unreasonable, *we cannot issue gag orders without interfering with a utility's freedom of speech rights.* We adhere to this determination. The U.S. Supreme Court has specifically disapproved advertising prohibitions by regulatory commissions, and has specifically held that the right of free speech extends to corporations. *Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm. of N.Y.* (1980) 447

U.S. 557; *Consolidated Edison Co. v. Pub. Serv. Comm. of N.Y.* (1980) 447 U.S. 530. (Emphasis added.)

The *Frankel* decision responded to a specific complaint asking that this Commission prohibit the Pacific Gas and Electric Company from publishing certain post-storm promotional messages. It should also be noted that the instant decision effectively prohibits the same defendant from bill-mailed free speech messages during four months of the year. Free Speech is allowed for the remaining two-thirds of the billing year.[3] On that very point, and with the same parties before it, this Commission in the immediate predecessor decision to this proceeding said:

> Even more importantly, it is incumbent on TURN to demonstrate whether it is permissible to ban the *Progress* entirely if we simply intend to use that "extra" space for conservation messages, or other speech, composed by the Commission, interested public participants such as TURN or other parties. This might simply be a substitution of one form of speech for another, a preference for governmentally sponsored or governmentally allowed speech. Such a preference could be more dangerous than the evil which TURN seeks to correct. *Pacific Gas and Electric Co.* (1981) ____Cal.P.U.C.2d____, D.93887 mimeo at p.159e.

Much of the above makes reference to the formation and characterization of certain property and equitable rights and may leave the impression that such rights are thought to be static and sterile—that the defendant's physical ownership and possession of property alone should dictate the result. Such intent should not be inferred. To the contrary, it is acknowledged that:

> (A)n owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. The necessity

[3] "PG&E will be permitted to continue to insert the *Progress* during the remaining months." (Majority opinion at p.23.)



> for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago. The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion. (5 Powell, Real Property (1970) Section 745, pp. 493-495.)

But here we deal with more than just a classical property right defense to some type of governmental aciton or constriction affecting property *per se*. Though certain 14th Amendment property rights have been diluted over the years *vis a vis* an owner's claimed right of usage of the property itself,[4] it is submitted that property rights have never been and should never be eroded, and by judicial fiction transferred to others, in order to justify a governmental constriction on First Amendment principals of free speech. Therein lies a major distinction present in this case.[5]

In the face of these basic constitutional rights, applicable to all, the majority proposes to create an equitable right which it states will, in the name of ratepayer protection, obviate all concerns and supervene all constitutional constraints. Additionally and unavoidably, the majority decision would result in a legal and administrative morass caused by future extensions of the Commisison's decreed property right. Such an exercise is as dangerous as it is unprecedented and unwarranted in the law.

[4] See discussion in *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201 (161 Cal.Rptr. 742, 605 P.2d 381) including references to Civil Code Section 1009 adopted after *Gion-Dietz*. See also discussion in *Agins v. City of Tiburon* (1979) 24 Cal.3d 266 (157 Cal.Rptr. 372, 598 P.2d 25).

[5] See *Consolidated Edison v. Public Service Commission* (1980) 447 U.S. 530, 540, "But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests in a government in overseeing the use of its property."

If further citation is desired for the proposition that no such right exists, see *Fields v. Michael* (1949) 91 Cal.App.2d 443, (205 P.2d 402).[6]

/s/ WILLIAM T. BAGLEY
William T. Bagley
*Commissioner*

[6] "That no direct authority upon it has been produced must be due alone to the fact that legal evolution had not progressed far enough to develop a needless precedent for a necessary conclusion." 91 Cal.App.2d at p.451.



**APPENDIX B**

**Decision 84 05 039 May 2, 1984**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| TOWARD UTILITY RATE NORMALIZATION, a Non-Profit California Corporation, *Complainant,* vs. PACIFIC GAS & ELECTRIC COMPANY, a Corporation, *Defendant.* | **Case 83-05-13 (Filed May 31, 1983)** |

**ORDER MODIFYING DECISION (D.) 83-12-047 AND DENYING REHEARING THEREOF**

Applications for rehearing of D.83-12-047 have been filed by Pacific Gas & Electric Company (PG&E), California Association of Utility Shareholders (CAUS), California Public Interest Research Group (Cal PIRG), and a group of PG&E shareholders (Hannon). An amicus curiae brief in support of PG&E's application was filed by Pacific Legal Foundation (PLF). Toward Utility Rate Normalization (TURN) has filed a response to the various applications, asking that rehearing be denied. PG&E has filed a motion to strike that response as untimely and TURN has responded to that motion asking that it be denied and stricken in part. Such motions are inappropriate and will be denied.

On March 7, 1984, by D.84-03-045, we stayed D.83-12-047 until further order of this Commission so that we might consider the merits of these filings.

We have carefully considered all the allegations of legal error and the responses thereto and are of the opinion that good cause for granting rehearing of D.83-12-047 has not been shown. However, D.83-12-047 should be modified to correct errors and to clarify our intentions. Therefore,

IT IS ORDERED that:

1. D.83-12-047 is modified as follows:

(a) The following discussion is added following page 7, mimeo.:

"While our previous decisions on this subject have concluded that the extra space is the property of ratepayers, we should point out that our jurisdiction over the extra space does not depend solely or entirely on a determination of the ownership of the extra space or the exact nature of a property right in such space.

"The extra space in the billing envelope is a byproduct of an activity essential to the operation of the regulated utility—billing. Since billing is an essential and proper function of a regulated utility, this Commission has allowed the utility to recover its reasonable expenses—postage, materials, labor, overhead—from ratepayers. The existence of the extra space is a direct consequence of the act of billing for utility services and the way in which postal costs are assessed.

"Because the billing space is so inextricably related to activities subject to routine regulation, we have repeatedly exercised our authority under the State Constitution and Public Utilities Code Section 701 to permit and require the space to be used for the benefit of ratepayers. The billing space has frequently been put to the obvious use of communicating with ratepayers. Recently, we have also solicited proposals that would allow ratepayers to benefit from the economic value of the extra space. (D.93887)



"Use of the billing space to accomplish various informative functions for the benefit of ratepayers now occurs so frequently that it had become a routine matter. Notices of applications for rate increases and notices of public hearings are regularly inserted without objection in billing envelopes (see, Resolution ALJ-149, October 20, 1982, p. 3.)—so routinely, in fact, that we have referred to extra space as being that space which is available *after* legal notices and, of course, the bills and return envelopes have been included. These notices have been included in billings precisely because the billing envelope is such an effective method of communicating with ratepayers. We have also required utilities to include notices of the availability of various energy conservation programs (D.92653) and conservation information (D.89316). We have required our utilities to include an insert informing ratepayers of the effects of a complicated federal tax law (D.93887). And most recently, we have used the billing space of telephone utilities to notify customers of a new lifeline program designed to assist low-income people to remain on the telephone system in the wake of the divestiture of AT&T. (D.84-04-053.) All of these are examples of the proper use of a valuable means of communication that the extra space provides.

"We have also permitted the utilities to use this extra space to communicate with ratepayers. Subject to our general oversight (e.g. P.U. Code Section 453 (c), (d)), utilities have used this space to inform customers of ways to reduce energy consumption, of the availability of special programs, of how to resolve problems with the utility's service, and of other topics. When a utility has used the extra space to engage in political advertising, we expressed our concern that ratepayers should not be required to bear any portion of the direct or indirect expense connected with such advertising. (D.93887.)

"Other uses of the extra space are certainly possible. TURN has presented evidence in an earlier case that a utility in another state has sold the extra space for commercial advertising unrelated the utility's business and used the resulting revenues to reduce rates to customers.

"Viewed in this general context, it appears to us that the issue raised by TURN's complaint is *not* whether the Commission may exert its authority over the billing space. As the previously stated examples demonstrate, the Commission has repeatedly, and we think properly, required the billing space to be used for the benefit of ratepayers. As we mentioned previously, this power has been exercised so routinely that we have defined "extra space" as excluding the space occupied by notices required by the Commission. The question raised by TURN's complaint, then, is whether TURN has presented a proposal for use of the billing space that is sufficiently beneficial to ratepayers for us to order implementation of the proposal. See, D.93887, mimeo, p. 157g, as modified. For reasons discussed in this decision, we are persuaded that TURN had presented such a proposal."

(b) On page 13, mimeo., the last sentence is modified to read:

"The fact that in hindsight these amounts did not precisely reflect PG&E's actual expenditures for postage during certain periods of time does not justify treating the extra billing envelope space as the property of the utility rather than of the ratepayers."

(c) On page 13, mimeo., at the end of the last paragraph, a sentence is added to read:

"Nor does this fact change our conclusion regarding this Commission's power to regulate the billing space as part of our overall regulatory authority."

(d) On page 17, mimeo., the last sentence is modified to read:



"Such Commission action is certainly within the ambit of our statutory authority and consistent with our normal regulation of the billing process."

(e) On page 18, mimeo., the third sentence in the first paragraph is modified to read:

"Whatever validity this argument still may have (see *General Telephone Co. v. P.U.C.* (1983) 34 Cal.3d 817), it does not pertain to property not belonging to the utility."

(f) On page 18, mimeo., the last sentence in the first paragraph and Footnote 4 are deleted.

(g) On page 22, mimeo., the first complete paragraph is modified to read:

"Before addressing the merit of TURN's proposals, we note that in other decisions we have recognized the value of effective participation by consumer organizations in Commission proceedings. Further, in our UCAN decision, we specifically recognized how space in a utility billing envelope could be used to allow a consumer organization to communicate with the ratepaying public and solicit voluntary contributions to support ratepayer participation. We stated:

"There is no question that participation by representatives of consumer groups tends to enhance the record in our proceedings. The California Supreme Court reminded us of that in deciding *Consumers' Lobby Against Monopolies (CLAM) v. Public Utilities Commission* (1979) 25 C 3d 891 which found that the Commission has jurisdiction to award attorneys' fees and costs to consumer representatives under certain circumstances. In reaching this conclusion, the Court noted:

"[T]he staff is subject to institutional pressures that can create conflicts of interest; and it is circumscribed by significant statutory limitations, such as lack of standing to seek either rehearing

(Pub. Util. Code Section 1731) or judicial review (Id., Section 1756) of Commission decisions." (25 C 3d 891, 908.)

We hasten to add that our staff is a dedicated, professional, highly competent one. The observation of the Court merely points out an inevitable facet of the unique position of our staff. There can be no denying that the principal representative of the residential and small business ratepayer is in fact the staff, whose job it is to challenge a utility's showing and, recommend the minimum rates necessary to ensure adequate service and provide a reasonable return to the utility. The staff, however, may not pursue appeals. Thus, if residential and small business ratepayers are to be fully protected, it is necessary that they be represented in our proceedings . . . .

Furthermore, while we believe that the opportunities for compensation for participation in our proceedings help assure the development of a full and fair record, we recognize the merit of the Center and Simmons' contention that such opportunity may seem illusory to an individual ratepayer. What the complainants propose is another alternative, which relies neither upon increased funding through rates nor necessarily upon compensation under one of our present procedures. It appears that there are many ratepayers in SDG&E's service area who would relish the opportunity of belonging to an organization which could afford to hire people with technical expertise to represent their particular interests in proceedings as technical as most of our major cases are. In fact, many of these ratepayers have written to us to express their support of this UCAN proposal." D.83-04-020, mimeo., pages 7-8."

(h) On page 23, mimeo., Footnote 6 is added at the end of the first paragraph to read:

"We note that in C.83-08-04 and C.83-12-03 several consumer groups including TURN are seeking access



to space in the Pacific Bell envelope. The checkoff mechanisms are among the proposals now under consideration in those proceedings."

(i) On page 23, mimeo., the last sentence in the second paragraph is modified to read:

"PG&E will be permitted to continue to insert the *Progress* during the remaining eight months and may also make use of any of the extra space not used by TURN during the months TURN's material is inserted."

(j) On page 28, mimeo., the second sentence in the first paragraph is modified to read:

"Assuming for argument that PG&E has some property right in this extra space, the proposal which we adopt here would be a "reasonable time, place, or manner" restriction in that it requires PG&E to share the extra space with TURN for a purpose which significantly benefits ratepayers."

(k) On page 28, mimeo., the sixth sentence in the last paragraph is modified to read:

"To the extent that the proposal as adopted restricts PG&E's use of the extra space, it does so on the grounds that the space belongs to the ratepayers and that this restriction is made pursuant to our overall regulatory authority, not on the basis of content."

(l) On page 30, mimeo., the second sentence in the first complete paragraph is modified to read:

"Here, PG&E claims that the right is the right to speak through unregulated and exclusive use of the extra billing envelope space."

(m) On page 30, mimeo., the second sentence in the last paragraph is modified to read:

"In fact, as we explained above, we are simply ordering PG&E, which has physical control over the billing space, to make it available for the benefit of ratepayers."

(n) On page 34, mimeo., the last sentence in the first paragraph is modified to read:

"As discussed above, the extra space is a byproduct of the billing process which is paid for by ratepayers."

(o) The following paragraph is added to page 34:

"In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has *treated* as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious."

(p) On page 35, mimeo., the first sentence is modified to read:

"Finally even assuming that the extra space is PG&E's property, it must not be forgotten that PG&E is a monopoly utility closely regulated by this Commission pursuant to authority derived from the State's Constitution."

(q) On page 35, mimeo., in the fifth line of the first paragraph, delete the numeral "4" and insert the numeral "6".

(r) On page 35, the last sentence is modified to read:

"This constitutional and statutory authority provides sufficient basis for a determination by the Commission that PG&E must make the billing space available to its ratepayers, or to representatives of those ratepayers."

(s) The first paragraph on page 36, mimeo., is deleted.

(t) The following Findings of Fact are added on page 39, mimeo., to read:



"25. The extra space in the billing envelope is a direct consequence of the utility billing process and the way postal costs are assessed.

"26. The billing space is inextricably related to routine utility activity.

"27. This Commission has allowed utilities to recover all reasonable billing expenses from ratepayers.

"28. This Commission has required and permitted utilities to use the billing space as a communications medium for the benefit of ratepayers.

"29. Participation by representatives of consumer groups tends to enhance the record in our proceedings and complements the efforts of the Commission staff.

"30. TURN's proposal will help assure the fullest possible participation in our proceedings."

(u) On page 39, mimeo., a Conclusion of Law 7A is added to read:

"Under the State Constitution and Public Utilities Code, this Commission has the authority to regulate the billing process and to ensure that billing space is used for the benefit of utility ratepayers."

(v) On page 41, mimeo., Ordering Paragraph 5(a) is modified to read:

"PG&E shall give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E shall be permitted to use the extra space during the remaining eight months and may also make use of any extra space not used by TURN during the months TURN's material is inserted."

2. PG&E's motion to strike TURN's response to the applications for rehearing is denied.

3. TURN's motion to strike a portion of PG&E's motion is denied.

4. Rehearing of D.83-12-047 as modified herein is denied.

5. The stay of D.83-12-047 is extended until further action of this Commission.

This order is effective today.

Dated May 2, 1984, at San Francisco, California.

I will file a written dissent.

VICTOR CALVO
*Commissioner*

I will file a written dissent.

WILLIAM T. BAGLEY
*Commissioner*

LEONARD M. GRIMES, JR.
*President*

PRISCILLA C. GREW
DONALD VIAL
*Commissioners*



COMMISSIONER VICTOR CALVO, Dissenting.

This Commission has done much during its history to ensure full and fair public participation in matters heard before it. Our liberal rules of standing, procedure and evidence are a testament to that history. Today, the majority attempts to expand public participation by permitting Toward Utility Rate Normalization (TURN), a respected and frequent intervenor in our proceedings, to directly solicit interest and funding from the ratepayers of Pacific Gas and Electric Company (PG&E) through the use of the extra space in the billing envelope PG&E sends to its ratepayers. I laud the effort, but for the reasons set forth below, I cannot support it.

The "extra" space in the PG&E billing is really not a "property" but is something of an accident. Relevant postage rates, being based on one ounce increments, are indifferent to whether a mailer uses one-quarter of that ounce, three-quarters of it, or the full ounce. The mailer pays for the fraction as if it were the whole. The monthly bill and the return envelope PG&E sends to its customers normally weighs not the full ounce but a fraction of it. So the question arises, what to do with the difference, the "extra" space?

PG&E currently uses this extra space to send its *Progress*, a shareholder-funded newsletter which, while pleasant and sometimes informative, is nonessential to the provision of safe and reliable utility services. TURN now asks that as a consumer organization it be permitted to periodically use the extra space to reach ratepayers who, if properly informed, might see fit to morally and/or financially support its efforts. In today's order, the majority reaffirms its earlier decision to grant TURN's request. I must dissent from this order. Some of my concerns were expressed in my earlier separate concurring opinion in this matter in which I dissented in part. I will reiterate them here and, having had time to further reflect on this matter, present additional concerns which now lead me to fully dissent from the majority opinion.

In reviewing this case, I was struck by the similarities between it and the case of *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), wherein the Supreme Court

struck down a state statute which required newspapers to provide political candidates whom they had criticized an opportunity to respond to the criticism. Similar to the Court's concerns in that case, it is not altogether clear to me that TURN's use of the billing envelope to disseminate its literature is required as a matter of either necessity or right. Thus, I am persuaded that we should not infringe on PG&E's rights of free speech guaranteed to it by the First Amendment.

TURN has other opportunities to reach its natural audience. It may solicit support through its own mailings. Additionally, our rules regarding intervenor fees are frequently used to reward TURN's good efforts and, in fact, in another action today we award TURN $13,102 in attorney's fees for its contribution in a Commission rate case proceeding. I question, therefore, if TURN or any other party *needs* access to the billing envelope in order to be an effective participant in our proceedings. As to rights, TURN certainly cannot lay claim to any greater rights than any other ratepayer or consumer group that might request access to the billing envelope. Thus, I am concerned that this Commission not place itself in a predicament where it will be called upon to resolve disputes as to whom or when or how often a multitude of competing groups or ratepayers should be granted access to the billing envelope. And, of course, the Supreme Court has implied that some rights are held by the utility should it desire to use the extra space for its purposes. *Consolidated Edison Co. v. Public Service Commission of New York,* 447 U.S. 530 (1980).

As to the practical shortcomings of this order, I noted in my separate opinion to Decision 83-12-047 that it is incumbent upon the majority to specify a precise and relatively simple method to resolve these sorts of disputes. Yet once again that necessity has been avoided by the majority. Also, in my opinion, granting TURN access to the PG&E billing envelope on eight occasions (four times per year for two years) is undue. A meaningful evaluation could take place with respect to a program of this nature within a year, yet the majority grants TURN use of the billing envelope for two full years. I have found both TURN and PG&E to be vigorous advocates and



constant adversaries and I would not look forward to resolving additional unnecessary confrontations between them.

I point out here that I found my concerns to be less compelling and urgent in Decision 83-04-020, *Center for Public Interest Law, et al.* v. *San Diego Gas and Electric Company.* The "UCAN" organization of that case is a ratepayer founded and comprised group with closer links to its constituency than is the case with TURN. That case was also void of the internecine rivalries between consumer groups with which I am concerned, a rivalry manifested in this case by the presence of the California Public Interest Research Group.

The Legislature has often expressed interest in the issue of public participation in Commission proceedings. Proposals for a consumer utility board comprised of ratepayers have been introduced by various legislators. I would be more inclined to support the majority if some express statutory provision addressed the request now before us. Instead, the majority essentially relies upon implicit authorities found in Public Utilities Code Section 701. I am not wholly convinced by their arguments. But, assuming that the majority is correct, having the authority to do something and deciding whether or when to exercise it are two separate questions. In this case and again assuming we have authority in this matter, I would not exercise our jurisdiction. Therefore, I must respectfully dissent.

/s/ VICTOR CALVO

Victor Calvo
*Commissioner*

WILLIAM T. BAGLEY, Commissioner, Dissenting:

This is written to reiterate and emphasize one aspect of my prior dissent in this matter (see D.83-12-047, Dissent of W.T. Bagley). That dissent is attached hereto, incorporated by reference, and is made a part of this dissent to the final order issued by the Commission majority today. After acknowledging an understandable societal dilution of property rights over the years, that dissent stated at page 7:

> But here we deal with more than just a classical property right defense to some type of governmental action or constriction affecting property *per se*. Though certain 14th Amendment property rights have been diluted over the years *vis a vis* an owner's claimed right of usage of the property itself, it is submitted that property rights have never been and should never be eroded, and by judicial fiction transferrred to others, in order to justify a governmental constriction on First Amendment principals of free speech. Therein lies a major distinction present in this case.

To restate this basic distinction, it is submitted that there is absolutely no precedent for, or constitutional basis of, a dilution and transfer of a person's property right in order to justify a restriction upon that person's right of free speech. Where a claimed property or governmental right conflicts with the First Amendment, the First Amendment prevails.

Conscious of the fact that the theory of an "equitable property right" in the envelope is illusory at best, the Commission majority now searches for an additional ground or rationale for its decision. The majority would now, additionally, rely upon an omnibus powers section of the Public Utilities Code.[1]

[1] "The Commission may supervise and regulate every public utility in the State and may do all things whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." (Section 701).



The majority also would amend a statement made in a most objectionable footnote to the original opinion and order, by adding the thought that defendant PG&E "may use any of the extra space not used by TURN. . .".[2]

Indulging in further contortions, the majority now adds the following paragraph to its original decision at page 34:

> "In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has *treated* as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious."

That last postulate immediately brings to mind the very recent U.S. Supreme Court decision, reversing the California Supreme Court, and saying that if there were a public trust to be imposed on the subject privately held lagoon, it should have been asserted during its inceptive years and not 130 years later. *Summa Corp.* v. *California Ex Rel. State Lands Commission et al.* 52 LW 4433 (April 17, 1984).

Putting that apt analogy aside, the basic fact remains that the shareholder's right, exercised at shareholder's expense, to use the company's envelope for a First Amendment-protected message is being curbed and transferred to others.

And now under the revised order TURN can determine, solely by its choice of paper weight, whether or not and if so how much material may be inserted in the envelope by defendant's management on behalf of the shareholder. See footnote 2, *supra*. Under this order we have the unseemly

[2] See page 23 of the original opinion: "It is reasonable to assume that ratepayers will benefit more from exposure to a variety of views—we will require PG&E to give TURN access to the extra space in the billing envelope four times a year—PG&E will be permitted to continue to insert the Progress during the remaining months".

This is now modified by adding: "*and may also make use of any of the extra space not used by TURN during the months TURN's material is inserted.*" (Emphasis added).

situation where government, by its order and without specifying any criteria whatsoever, allows one party to proscribe the free speech of the other. That, compared to government proscription, is deprivation squared.

It is of one genre to limit, for example, the size and nature of improvements on ocean and bay front property in order to preserve public view and enjoyment of our natural resources; it is quite another to order such property owner to organize public meetings on his or her view property (four times a year) for the benefit of extraneous interests and to *forbid* that owner from speaking at such gatherings if the other interests object. Literally, the free speech forum—the podium if you will—is being transferred from one party to another by this governmental decision.

The majority's basic problem is that it refuses to recognize that corporate entities are granted and continue to enjoy First Amendment rights. That is exemplified by its facade-like transfer of ownership of the forum, and likewise by its new reliance on Section 701. Just because the legislature grants to the PUC a broad set of powers over public utilities does not make those utilities any less the beneficiaries of First Amendment protections and does not make deprivation of speech rights anymore constitutional.

It is not inordinate to assume that government at some future time would assert additional authority over the newspaper industry, and the many corporate owners thereof. Gasoline rationing was a fact of life not too many years ago. Conceivably there may come a day when we would face the necessity of paper or newsprint rationing in a monopolized, short supply industry. Congress could, constitutionally, declare suppliers and even a limited number of distributors to be "Public Utilities". But neither Congress nor the Legislature—nor the designated regulatory body—could instruct the corporate newspaper owner to use or not use fuel in pursuit of a given story, nor could the newspaper supplier be ordered to limit its sales to certain desirable news usages, even though those suppliers were legally denominated "monopoly public utilities" and placed under a statute comparable to Section 701.



In its verve to support "consumer rights", this majority has run rough-shod over basic constitutional rights of free speech—and without giving thought to logical extensions of its act. Would it extend its free speech constructions to other corporate entities which might be regulated in the future just because they are regulated. And who, after TURN gets its chance, will next be able to control this defendant's right to speak. In the context of the First Amendment, this is a very illiberal decision by a majority who would seek to liberalize consumer rights at the expense of the right of Free Speech. I would remind the majority that in the past other seeming Democratic societies, on a larger scale, have followed a similar path. They are no longer Democratic societies.

/s/ WILLIAM T. BAGLEY
William T. Bagley
*Commissioner*

May 2, 1984
San Francisco, California

Decision 84-03-045

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

| | |
|---|---|
| TOWARD UTILITY RATE NORMALIZATION a non-profit California corporation; *Complainant,* vs. PACIFIC GAS AND ELECTRIC COMPANY, a corporation, *Defendant.* | Case No. 83-05-13 |

### ORDER EXTENDING STAY OF DECISION 83-12-047

Petitions for rehearing of D.83-12-047 have been filed by Pacific Gas & Electric Company, California Association of Utility Shareholders, California Public Interest Research Group, and jointly by J. S. Hannon and B. R. Worthington, custodians, and J. K. Murphy. A stay of D.83-12-047 is in effect in accordance with Public Utilities Code Section 1733. The merits of the petition are still under consideration. We will respond to the petition when our review has been completed.

In the interim,

IT IS HEREBY ORDERED that the stay of D.83-12-047 shall remain in effect until further order of this Commission.

This order is effective today.

Dated March 7, 1984, at San Francisco, California.

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
WILLIAM T. BAGLEY
*Commissioners*

Commissioner Leonard M. Grimes, Jr. being necessarily absent, did not participate.



APPENDIX D

Relevant Parts of Decision No. 93887 Are Printed As Follows:

Decision 93887 December 30, 1981

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

| | |
|---|---|
| Application of PACIFIC GAS AND ELECTRIC COMPANY for authority, among other things, to increase its rates and charges for electric and gas service. *(Electric and Gas)* | Application 60153 (Filed December 23, 1980) |
| Application of PACIFIC GAS AND ELECTRIC COMPANY for authority, among other things, to increase its rates and charges for electric service. *(Electric)* | Application 58545 (Filed December 26, 1978) |
| Application of PACIFIC GAS AND ELECTRIC COMPANY for authority, among other things, to increase its rates and charges for gas service. *(Gas)* | Application 58546 (Filed December 26, 1978) |

**B. Miscellaneous**

**1. PURPA**

TURN presented witness R. Spertus to testify on whether the Commission is bound by the advertising standards set forth in Title I, Section 113(b) (5) and Section 115(h) of PURPA; whether PG&E has violated such standards by its placing of political printed matters in its customer bill or dividend envelopes; and, if affirmative, what lawful remedies should be ordered by the Commission.

Witness Spertus alleges that PG&E has violated the following sections of PURPA by placing certain printed matter into the customer bill or shareholders dividend envelopes:

> *"Title I, section 113 (b) (5)*
>
> "Advertising—No electric utility may recover from any person other than the shareholder (or other owners) of such utility any *direct or indirect* expenditure by such utility for promotional or *political* advertising as defined in section 115 (h).
>
> *"Title I, section 115 (h) (selections):*
>
> "(A) The term 'advertising' means the commercial use, by an electric utility, of any media, including newspaper, *printed matter,* radio, and television in order to transmit a message to a *substantial number of members of the public or to such utility's electric consumers.*
>
> "(B) The term 'political advertising' means any advertising for the purposes of influencing public opinion with respect to legislative, *administrative,* or with respect to *any controversial issue of public importance.*" (Emphasis added.)

Spertus states that the cost of distributing these messages would be considerably higher to PG&E if it did not pick up a free ride by using the bill and dividend envelopes. He further testified by including the PG&E Progress in such mailing, it deprives sale and usage of such space to other advertisers. The political advertising themes that Spertus refers to are the need for prompt licensing of Diablo, the need to take Canadian gas,



the need for improvement in PG&E's regulatory treatment in order to ensure future electric supplies. He recommends that the Commission disallow PG&E the mailing costs for its customers monthly bills and shareholders dividends because they are direct or indirect expenditures for political advertising and further to institute a mechanism for physical production of bill inserts and for the writing and editing of the information contained in them.

PG&E argues that TURN's witness is in error in that this Commission did not adopt the PURPA advertising standards. PG&E states that the Commission, in considering whether it should adopt the PURPA standards, reported to the Department of Energy (DOE) that by Public Utilities (PU) Code Section 796 and adoption of the use of FPC Account 426.4 of the Uniform System of Accounts for Public Utilities and Licenses, it complies with the PURPA standard on advertising. PG&E argues that the California code provisions, unlike PURPA, do not include, as political advertising, the discussion of controversial issues of public importance. PG&E further argues that even if the Commission had adopted PURPA definitions of political advertising, there would be no violation since PG&E's stockholders pay for the cost of the PG&E *Progress* and shareholders letters, and there is no prohibition against use of billing or dividend envelopes to distribute such material. PG&E further argues that virtually every example of alleged political advertising in the PG&E *Progress* fits within one of the exceptions in PURPA, Section 115 (h) (2) and that the remedies proposed by Spertus were unsupported and in some cases unconstitutional.

We are persuaded that TURN's arguments have solid conceptual merit. However, for the reasons which follow, we decline to implement at this time the access mechanisms which TURN proposes. We also shall not bar PG&E from continuing to mail out the *Progress* in the billing and dividend envelopes. We do not rule out the possibility of such action in the future, however.

Our analysis begins with the question of whether this Commission adopted a PURPA standard barring the utility

from recouping from ratepayers costs associated with political advertising. In its November 8, 1980 PURPA compliance filing with the Department of Energy, the Commission addressed the question, "Does the Advertising Standard that you had adopted require . . . [d]efinitions of political and promotional advertising which conform with those given in section 115 (h) (1) and (2) or 304 (b) (1) and (2) of PURPA?" The Commission's answer was "Yes." We feel it is clear that this Commission has adopted the prohibition on the recoupment by utilities of political advertising expenditures from ratepayers.

We next must ask whether PG&E engages in political advertising in the *Progress*. It is clear that, from time to time, PG&E does engage in such advertising. We need only look at the July, 1981, *Progress* which TURN appended to its brief. The editorial there contained a lengthy critique of the so-called "off gas" requirement mandated by Congress in the 1978 Powerplant and Industrial Fuel Use Act (PIFUA). The editorial was obviously comment "for the purpose of influencing public opinion with respect to legislative . . . or . . . controversial issues of public importance," since it came at a time when Congress was considering amendments to PIFUA in conjunction with tax and budget matters. (We note Congress did in fact vote to terminate the off gas requirement for utilities.) We have to state, candidly, that we think PG&E's position on this issue was correct. The editorial even contained remarks of the Commission's President pointing out the expense associated with the off gas requirement. But our agreement with PG&E on such an issue does not blind us to the fact that, from time to time, the *Progress* contains political comment on important and controversial issues of public policy. If we are to adhere to the standards which Congress has set out for us in PURPA, we must recognize political speech for what it is and act to ensure that ratepayers do not help the utility, directly or indirectly, meet the costs of mailing or distributing such speech.

It is frequently stated by PG&E that the ratepayers face no extra cost because of the *Progress*. It is stated that shareholders pay for the entire cost of composing and printing the *Progress*. We acknowledge this is true. PG&E claims it merely inserts the *Progress* into the unused "extra" space in the billing or dividend



envelope and does not cause any extra postage costs. (Postage is paid for, as is the case with envelopes, by ratepayers.) We acknowledge that no extra envelope or postage costs are incurred. The fallacy in PG&E's position, however, is its implicit claim that there is no other use to which the "extra" space may be put.[1] We think there are or may be many other uses for the "extra" space. That such space could be sold to public advertisers (without any extra postage cost) at once demonstrates that the space surely has economic value.[2] That economic "value" belongs to the ratepayers, who create the space by paying for the envelope and postage. Use of the space for the *Progress* instead of some other purposes deprives the ratepayers of that "value," which they own. Since PG&E captures that "value" without charge, it is recovering a cost from the ratepayers. We believe such recovery is forbidden under PURPA.

We shall explain further our view that there are other uses to which the "extra" space may be put, in order to show that there definitely is a cost which ratepayers are forced to bear when the *Progress* is mailed with the customer bill. TURN introduced into the record remarks made by PG&E's Manager of Energy Conservation and Services at the Commonwealth Club on April 27, 1981:

> "When it comes to marketing communications the seemingly unexciting medium of our bill offers a surprising amount of pull. Take the case of our furnace filter promotion. We had planned to run a bill insert promoting a 50 cents off coupon for furnace filter replacements. However, the CPUC preempted the bill insert with a legal notice and we had to resort to newspaper advertising to promote the certificate. Spending about $150,000 we managed to get 29,000 redeemed. Six months later when

---

[1] We define such "extra" space as the space remaining in the billing or dividend envelope, after inclusion of the monthly bill, dividend check and/or required legal notices, for inclusion of other materials up to such total envelope weight as will not result in any additional postage cost. The "extra" space is the space which the *Progress* now occupies.

[2] TURN alleges the "extra" space in Kansas Gas and Electric billing envelopes is now being sold, without objection by the public, to commercial advertisers as a means of raising revenue to offset the utility's revenue requirement.

time came to change the filters again we ran the bill insert for $7,000 and got 23,000 coupons redeemed. So obviously the bill insert is the way to go."

These remarks illustrate perfectly the "opportunity cost" that the *Progress* causes ratepayers to bear. PG&E's management obviously chose to mail the *Progress* and the legal notice, rather than the legal notice and the useful furnace filter replacement promotion. As a result, ratepayers were forced to bear the costs of inefficient use of the billing envelope. Use of the "extra" space for the *Progress* deprived ratepayers of all the savings inherent in conservation, i.e., in the utility's selling less gas due to more efficient furnace operation.

PG&E would at the very least have to pay fourth class bulk mail rates for the Progress if it did not mail it with the customer bill. It is this cost which PG&E improperly recovers, albeit indirectly, from ratepayers, who are deprived of the value which their expenditures (for postage and envelopes) have created. It is not content that we are concerned with. The significant point to remember is that we have no way of knowing how many times in the past PG&E was (or how many times in the future it would be) forced, due to inclusion of the *Progress* to defer a more efficient use of the "extra" space in the billing envelope which would have saved (or earned) money for ratepayers.

The same analysis, however, cannot be applied to PG&E's practice of mailing the *Progress* in dividend envelopes. Although it might be said that ratepayers technically "own" the "extra" space in the dividend envelope, it cannot be said that *economic* (as opposed to political or propagandistic) "value" is being lost to ratepayers as a result of inclusion of the *Progress* in that space. While it is certainly conceivable that the "extra" space in the billing envelope could be sold to would be advertisers, we are not aware of corporations selling space in their dividend envelopes to would be advertisers. By contrast, the normal and customary practice is for corporate management to communicate with shareholders when dividends are distributed. This inures to ratepayers' benefit, at least in part, because it allows for capital to be raised privately, without ratepayers having to put capital up front for utility operations.



We cannot see any real "opportunity cost" associated with mailing the *Progress* in the dividend envelopes.

Having come this far in our analysis, we next must ask what steps we should take to bar PG&E from recovering from ratepayers a cost of its political advertising or, alternatively stated, what steps we should take to utilize most efficiently for the ratepayers' benefit the "extra" space occupied by the *Progress* in the billing envelope. We see a number of possibilities and a host of problems for each possibility.

One possible solution is to ban the *Progress* entirely. We are inclined to believe that such action is constitutionally permissible as a proper "time, place and manner" restriction on speech that would be allowed under *Consolidated Edison Co. v. Public Service Commission* (1980) 447 U.S. 530. There the high court stated the well established principle that the government may impose time, place and manner restrictions on the exercise of speech where such restrictions "serve a significant governmental interest and leave ample alternative channels for communication. [Citations.]" (*Id.* at p. 535.) The significant governmental interest to be served by an *across the board* ban on the *Progress* in billing envelopes is the interest identified by Congress in PURPA, namely, saving ratepayers from having to bear the cost, directly or indirectly, of utility political advertising. As demonstrated above, that cost is real and, although as yet unquantified, potentially enormous, whether viewed as the "opportunity cost" of foregone revenue or otherwise. We also believe there are ample alternative means by which PG&E may broadcast or distribute its views to the public.

But we have to ask if such a ban would ultimately be in the ratepayers' best interest. As it is now, PG&E's *Progress* does contain from time to time useful information about conservation programs, cost saving measures, Commission action and the like. The cost of composing and printing such information is borne by shareholders. Such benefit to ratepayers must be weighed against the "opportunity cost" borne by ratepayers. It is unclear at present how that balance should be struck.

Even more importantly, it is incumbent on TURN to demonstrate whether it is permissible to ban the *Progress*

entirely if we simply intend to use that "extra" space for conservation messages, or other speech, composed by the Commission, interested public participants such as TURN or other parties. This might simply be a substitution of one form of speech for another, a preference for governmentally sponsored or governmentally allowed speech. Such a preference could be more dangerous than the evil which TURN seeks to correct. We believe it might be invalidated for the reasons the content-based regulation (a ban on pro-nuclear speech) was invalidated in *Consolidated Edison.* This is a problem to which parties like TURN must devote greater attention if we are to arrive at a permissible means of more efficiently using the "extra" space in billing envelopes.

A second possibility is to employ a public access mechanism similar to what TURN proposes. In other words, for every political message PG&E propagates in the *Progress,* we would allow TURN or other consumer groups to reply. We realize such opportunities to reply are already provided by private media. But we are concerned that we may lack the expertise, staff resources and/or public mandate to devote ourselves to the task of identifying what is or is not political speech in any given instance. We also are concerned that we do not have in place a fair mechanism for determining just who should be allowed to respond to PG&E. Should it be TURN? California Manufacturers Association? California Retailers Association? Citizens Action League? Perhaps we should allow for a lottery to determine such opportunity to respond. However, we think this would simply result in chaos and confusion. Again, we think this is a problem to which TURN has given insufficient attention. TURN itself recognizes the difficulties inherent in an access mechanism.

A third possiblity is to charge PG&E a fee for use of the "extra" space whenever it indulges in political speech. Again we see problems in identifying what is or is not political speech. We think it possible that innumerable hours of hearing time would be devoted to identifying what fee should be charged. Given our many other tasks, we do not think that would be productive.



A fourth possibility is to auction the extra space off to the highest reputable commercial advertiser. We invite TURN to report to us more fully on the experiment underway at Kansas Gas and Electric. In this era of high utility bills, we think every means of meeting the revenue requirement without increasing customers' bills must be explored. Such advertising would be similar to the Yellow Pages space sold by telephone utilities, except that the space available would only be the "extra" space as defined above. We think it possible that a significant amount of money could be raised by this means. We also think it possible that devoting the "extra" space to commercial speech solely for purposes of revenue generation to offset the revenue requirement would avoid the difficult First Amendment problems associated with the first three possibilities discussed above.

There may be other possibilities. We invite TURN or any other interested party to file an application with this Commission with a proposed solution to the "extra" space problem. The application would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the "extra space" more efficiently for ratepayers' benefit. We caution, however, that we will not lightly adopt such an order and that the considerable First Amendment problems must be fully addressed in such application.

**[Relevant Findings of Fact of Decision No. 93887]**

52. It is reasonable for PG&E to seek recovery of Nuclear Department A&G expenses relating to Diablo in the Diablo offset proceedings.

53. PG&E should resolve the operating status of Humboldt by the time it files its next NOI for 1984.

54. It is reasonable for PG&E to include only short-term borrowings in excess of balancing account undercollections and short-term investments in calculating the AFUDC rate.

55. It is reasonable to exclude estimated Canadian take-or-pay payments from Gas Department rate base and to consider carrying costs related to take-or-pay payments in a GAC proceeding.

56. A conservation incentive program has the potential to stimulate greater productivity in utility conservation programs but there is insufficient evidentiary basis for adoption of such a program in this proceeding.

57. It is reasonable to require PG&E to submit a report on or before March 31, 1983 showing for 1982 the dollars budgeted for maintenance, the dollars spent, and the status of its maintenance program.

58. Because the cost of envelopes and postage is included in the development of revenue requirement, the "extra" space (now occupied by the *Progress*) in the envelopes used for billing and dividend checks is properly considered as ratepayer property. The "extra" space is the space remaining, after inclusion of the monthly bill, dividend check and/or legal notices, for inclusion of other materials up to such total envelope weight as will not result in additional postage cost.

58a. There is a cost to ratepayers as a result of PG&E's using the "extra" space in billing envelopes for mailing the PG&E *Progress;* there is no cost to ratepayers from PG&E's using the "extra" space for mailing the *Progress* to shareholders with dividend checks.

59. PG&E improperly recovers the cost of mailing its political advertising to ratepayers through its use of the extra space in billing envelopes because this practice allocates to PG&E, and deprives the ratepayers of, the economic value of the "extra" space in the billing envelope.

60. The mose efficient means of capturing for ratepayers' benefit the full economic value of the extra space remains to be determined in a future proceeding.

61. It is reasonable to require PG&E to maintain records on its conservation fund expenditures on a program-by-program basis so that program expenditures may be separately identified, justified, and evaluated for reasonableness.

62. It is reasonable to revise the AER to $.00276 kWh to produce $10,684,000 in additional AER revenues in recognition of the 12.20% rate of return adopted in this decision.



**APPENDIX E**

SUPREME COURT
FILED
OCT 4, 1984
LAURENCE P. GILL, *Clerk*
*Deputy*

## ORDER DENYING WRIT OF REVIEW

## S.F. No. 24734

## IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

## IN BANK

PACIFIC GAS & ELECTRIC COMPANY, *Etc.*,
*Petitioner,*

v.

PUBLIC UTILITIES COMMISSION, *et al.*,
*Respondent.*

KAUS, J., DID NOT PARTICIPATE.

Petition for writ of review DENIED.

Grodin, J. and Lucas, J., are of the opinion the petition should be granted.

BIRD
*Chief Justice*

**APPENDIX F**



# IN THE
# SUPREME COURT OF THE STATE OF CALIFORNIA

PACIFIC GAS AND ELECTRIC COMPANY.
*Appellant.*

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.
*Appellee.*

**No. 24734**

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Pacific Gas and Electric Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, denying a writ of review of the decision of the Public Utilities Commission of the State of California, entered in this action on October 4, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATE: November 5, 1984

MALCOLM H. FURBUSH
ROBERT OHLBACH
PETER W. HANSCHEN
ROBERT L. HARRIS
PATRICK G. GOLDEN
77 Beale Street
P. O. Box 7442
San Francisco, CA 94120
(415) 781-4211

By _____
ROBERT L. HARRIS
*Attorneys for Appellant*
*Pacific Gas and Electric Company*



## PROOF OF SERVICE BY MAIL
(C.C.P. Secs. 1013a(1) and 2015.5)

I, the undersigned, state that I am a citizen of the United States and employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; that my business address is 77 Beale Street, San Francisco, California 94106; and that on the date set out below I deposited a true copy of the attached

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

sealed in envelope(s) with postage thereon fully prepaid in a mailbox regularly maintained by the Government of the United States in the said City and County and addressed as follows:

JANICE E. KERR
DIANE I. FELLMAN
*Attorneys at Law*
Commission Staff
350 McAllister Street
San Francisco, CA 94102

WILLIAM L. KNECHT
*Attorney at Law*
524—23rd Street
Oakland, CA 94612

JOSEPH E. BODOVITZ
*Executive Director*
Calif. Public
Utilities Com.
350 McAllister
San Francisco, CA 94102

ROBERT SPERTUS
*Attorney at Law*
Toward Utility Rate
Normalization
693 Mission St., 2nd Floor
San Francisco, CA 94105

ETHAN SCHULMAN
*Attorney at Law*
Center for Law in
the Public Interest
10951 West Pico Blvd.
Los Angeles, CA 90064

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct:

November 5, 1984 (Date)

MARLENE DONG (Signature)

**APPENDIX G**

PUBLIC UTILITIES
COMMISSION
MAY 31, 1983
SAN FRANCISCO OFFICE

# BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

| | |
|---|---|
| TOWARD UTILITY RATE NORMALIZATION, a Non-Profit California Corporation, *Complainant,* vs. PACIFIC GAS & ELECTRIC COMPANY, a Corporation, *Defendant.* | **Complaint No. 83-05-13** |

1. TOWARD UTILITY RATE NORMALIZATION (hereinafter TURN), complainant in this proceeding, is a non-profit California corporation with principal offices in the City and County of San Francisco. TURN represents the interests of residential utility consumers generally, as well as specific consumer organizations and constituencies, such as the statewide Consumer Federation of California, a federation of approximately one hundred organizations; the Consumer's Cooperative of Berkeley, with a membership of approximately 90,000 families; San Francisco Consumer Action; the California Legislative Council for Older Americans; the California Gray Panthers and other organizations and individuals.

2. PACIFIC GAS & ELECTRIC COMPANY (hereinafter PG&E), a California corporation, is a public utility providing electric and gas service to much of Northern California, with principal offices at 77 Beale St., San Francisco, California. PG&E is subject to regulation by the Public Utilities Commission of the State of California.

3. PG&E sends a monthly bill by first class mail to each of its electricity and natural gas customers. The weight of the envelope—and the bill and legal notices it contains—is less than one ounce. PG&E includes an insert ("The PG&E Progress") in the "extra space" available in said envelope.

4. In Decision No. 93887, issued December 1981 (as modified by Decision No. 82-03-047 issued March 2, 1982) the Commission declared that the "extra space" in the billing envelope belonged to the ratepayer and could be utilized on the ratepayers' behalf for some beneficial public purpose. The Commission specifically invited TURN or other parties to use the Commission's complaint mechanism to offer suggestions for the use of the extra space.

> We invite TURN or any other interested party to file a complaint with this Commission with a proposed solution to this 'extra' space problem. The complaint would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the 'extra space' more efficiently for ratepayers' benefit. (D. 82-03-047 at p. 8)

5. In D. 83-04-020 issued April 6, 1983 the Commission authorized the Utility Consumers Action Network (UCAN) to insert informative printed material in the billing envelopes of San Diego Gas & Electric Company for the purpose of soliciting memberships and contributions for UCAN.

6. PG&E reserves for itself the exclusive right to use the "extra space" in the billing envelope and has therefore violated an order of the Commission, as promulgated in Decision No. 93887. (PG&E's explicit refusal to permit TURN access to the extra space is documented in Exhibit A, attached hereto.)

7. PG&E has the mechanical equipment necessary to include inserts (such as additional printed material or envelopes) in its billing packets.

8. PG&E ratepayers will benefit if intervenors representing them in CPUC proceedings have sufficient funds to engage attorneys, witnesses, and other competent advocates.



9. Currently residential consumer advocates such as TURN do not have sufficient funds to participate fully in all important PG&E proceedings before this Commission.

10. TURN has submitted herewith (in Exhibit B of this Complaint) alternate proposals for one beneficial public use of the extra space in the PG&E billing envelope, to wit, the circulation of a "Consumer Advocacy Checkoff" to solicit voluntary donations from PG&E's customers.

11. The "Consumer Advocacy Checkoff" is reasonably likely to attract a significant number of voluntary donations from PG&E customers. Therefore, this use of the extra space in the PG&E billing envelope is a more effective use of the economic value of that space than that provided by the existing alternatives, i.e., the dissemination of the "PG&E Progress" and/or the non-use of the extra space.

12. The "Consumer Advocacy Checkoff" is one beneficial use of the extra space; approval by the Commission of the TURN proposal will not preclude later approval of other beneficial uses.

## RELIEF SOUGHT

WHEREFORE, TURN, complainant in this action, respectfully requests that the California Public Utilities Commission act expeditiously and order that:

1. PG&E shall make available access to the extra space in its billing envelopes for the purpose of circulating to its electricity and natural gas customers a "Consumer Advocacy Checkoff," as described in this order.

[*For Alternate Proposals One and Two*]

2. A "Consumer Advocacy Checkoff" insert shall be prepared that will serve to: 1) Explain this program; 2) Set forth a list of those pending and anticipated PG&E applications and other cases likely to have a significant effect on the customers' rates and service; and, 3) Invite voluntary donations to support the advocacy of certain residential consumer organizations on behalf of PG&E's residential customers before this Commission.

[*For Alternate Proposal Three*]

2. A "Consumer Advocacy Checkoff" insert shall be prepared that will serve to: 1) Explain the program; 2) Set forth a list of those pending and anticipated PG&E applications and other cases likely to have a significant effect on the customers' rates and service; and, 3) Invite voluntary donations to support TURN'S advocacy on behalf of PG&E's residential customers before this Commission.

3. Access to the billing envelope shall be provided for this purpose no fewer than four times per year.

4. PG&E shall continue to provide access to the billing envelope for this purpose until two years from the effective date of this order unless otherwise extended or terminated by order of this Commission.

5. All costs associated with printing and inserting the Consumer Advocacy Checkoff in the PG&E billing envelope shall be defrayed by TURN and the other organizations, if any, participating in the Checkoff. Costs shall be allocated in proportion to each organization's share of the total proceeds of the Checkoff solicitation.

6. All such further relief that the Commission deems proper be granted.

TOWARD UTILITY RATE
NORMALIZATION

By: SYLVIA M. SIEGEL

Sylvia M. Siegel
*Executive Director*

Dated: May 31, 1983



**TOWARD UTILITY RATE NORMALIZATION**
693 Mission Street
2nd Floor
San Francisco, CA 94105
(415) 543-1576

March 7, 1983

Robert Ohlbach, Esq.
General Attorney
Pacific Gas & Electric Co.
77 Beale St., P.O. BOX 7442
San Francisco, CA 94106

Dear Mr. Ohlbach:

As you are no doubt aware, the California Public Utilities Commission in Decision No. 93887 (issued 12-30-81) determined that the "extra" space contained in the PG&E billing envelope must be regarded as the property of the ratepayer. In view of this determination TURN—a representative of PG&E ratepayers—hereby requests the right to use this property for a beneficial public purpose. Specifically, in the near future we intend to submit a statement to your company for inclusion in the billing envelope. The proposed statement will discuss an issue of importance to your customers as consumers of electricity and natural gas and will outline a specific strategy for reducing the size of their monthly utility bills.

I am writing you now to ask for the following information:

1. As a matter of policy, will PG&E accept a message prepared by TURN for inclusion in the "extra" space?

2. If so, what specific criteria will you use to determine whether or not a particular message will actually be accepted for inclusion?

3. What, if any, expenses would you expect TURN to defray if a message prepared by it were inserted in the "extra" space?

4. How many days in advance of a particular monthly billing must you receive a message to allow sufficient time for printing and insertion?

I would appreciate receiving an answer to the above questions within ten days. TURN earnestly believes that our contemplated message should reach the ratepayers as soon as possible. When we have a clear statement of PG&E policy in this matter we will be able to draft a final version for submission to you.

Very truly yours,

SYLVIA M. SIEGEL
*Executive Director*



**PACIFIC GAS AND ELECTRIC COMPANY**
77 Beale Street, San Francisco,
California 94106
P. O. Box 7442, San Francisco,
California 94120
Telephone (415) 781-4211
Telecopier (415) 543-7813

March 16, 1983

Sylvia M. Siegel
Executive Director
Toward Utility Rate Normalization
693 Mission Street, 2nd Floor
San Francisco, CA 94105

Dear Mrs. Siegel:

Mr. Ohlbach has referred to me your letter of March 7, 1983, in which you indicated that Toward Utility Rate Normalization (TURN) intended to submit a statement for inclusion in PGandE's billing envelope. You also asked a number of questions on PGandE's policy on this matter and the procedures to be followed.

As you referenced, the CPUC has addressed this matter in its Decision No. 93887, as modified on rehearing by Decision 82-03-047. In those decisions, the Commission indicated that access to the so-called "extra" space in utility bill envelopes is a complicated issue with broad constitutional ramifications. Rather than advise you on PGandE's policy on this matter, I suggest that you follow the procedure ordered by the Commission in its decisions.

Very truly yours,

PETER W. HANSCHEN

## EXHIBIT B

### Consumer Advocacy Checkoff Proposals

TURN has formulated three alternate Consumer Advocacy Checkoff proposals. Proposal Number One envisions a program open to all qualified consumer organizations representing PG&E's residential customers in regulatory proceedings before this Commission. For reasons set forth in Exhibit C, attached hereto, this proposal asks that the CPUC and/or its designated representative (perhaps the Public Advisor) assume overall responsibility for screening participants and performing other routine and ministerial tasks.

Proposal Number Two removes the operation of the Checkoff program from the immediate supervision of the Commission and entrusts that responsibility to a "blue ribbon" panel composed of five members selected by the Senate President Pro Tempore from amongst past directors/counsel of the State Department of Consumer Affairs and former Commissioners of the CPUC.

Proposal Number Three asks that TURN be allowed to solicit voluntary donations from PG&E's customers by means of an insert placed in the extra space in the PG&E billing envelope. This proposal is obviously the simplest and requires no further CPUC involvement.

### Proposal Number One

Four times a year a "Consumer Advocacy Checkoff" insert—produced and written by the CPUC's Public Advisor or other designated representative—would be included in the PG&E monthly billing envelope. This insert would do three things: 1) Advise the reader about the purpose of the Checkoff; 2) Describe pending PG&E cases that would affect the rates or utility service of residential customers; and 3) List those bone fide consumer advocacy organizations seeking financial support through this mechanism.



If a PG&E customer decided to contribute to one of these organizations he or she would use a special envelope included in the "extra space" to mail a donation to a central collection point, in care of the Public Advisor, for transmittal to that organization.

For illustrative purposes TURN suggests an appropriate insert might be worded as follows:

* * * * *

[This Message Has Been Prepared By the Public Advisor of the California Public Utilities Commission and Is Included in This Envelope by Order of the Commission. PG&E Does not Necessarily Agree with its Contents.]

### Consumer Advocacy Checkoff

**1. Background.**

The California Public Utility Commission encourages the participation of informed intervenors in its regulatory proceedings. Although the Commission's own staff represents the interests of the public generally, intervenors, representing various specific classes of utility customers, help bring to its attention additional information which aids it in the decision-making process. Some intervenors are adequately funded by the voluntary contributions of their constituents, but others are either unable to participate in our proceedings or do so under the constraints of significant financial hardship. Accordingly, the Commission has decided to permit certain residential consumer representatives to use this extra space in the PG&E billing envelope to solicit funds for consumer advocacy.

The Commission cannot assume responsibility for the qualifications, efficacy, or financial accountability of the organizations listed below. Each such organization, however, has made the following showing: first, that it is a non-profit California corporation; second, that it will undertake to represent a constituency made up of PG&E's residential customers in one or more of the regulatory proceedings listed below; third,

that it has a mechanism to account for the receipt and disbursal of funds obtained through this solicitation and will make such information available to the public on an annual basis; fourth, that it could not participate in regulatory proceedings involving PG&E without significant financial hardship; and fifth, that it has an understanding of the regulatory process and a present ability to formulate issues and engage competent advocates and expert witnesses in pursuit of identified goals. If you would like to have more information about any of the organizations you may write directly to them at the addresses shown below.

2. Applications and Other CPUC Proceedings Affecting PG&E's Residential Gas and Electricity Tariffs.

[A list is provided here of those presently known PG&E applications or other cases that will have a significant effect on the customers' utility bill, and which will be heard within the next 12 months. A brief description of the issues presented and the effect on the residential customers' bill (if known) is also included.]

----------Detach Here ----------

Residential Consumer Advocacy Organizations.

I wish to contribute $ to the organization checked below (A "*" next to the name of an organization means that your contribution is tax-deductible).

.....

[A list of organizations, together with their addresses and dates of incorporation, is provided in this space]

.....

Name of Contributor _____

Street _____

City _____ Zip _____

*****



**Proposal Number Two**

This proposal is similar in all respects to Proposal Number One except that all functions performed by the Commission or its designated representative would be performed by a "blue ribbon" panel (or under its supervision).

**Proposal Number Three**

TURN would prepare an insert basically similar to that described above. For illustrative purposes such an insert might read as follows:

*****

[This Message Has Been Prepared By Toward Utility Rate Normalization (TURN) and Is Included in This Envelope by Order of the Commission. PG&E Does Not Necessarily Agree with its Contents.]

**Consumer Advocacy Checkoff**

The California Public Utility Commission encourages the participation of informed intervenors in its regulatory proceedings. Although the Commission's own staff represents the interests of the public generally, intervenors, representing various specific classes of utility customers, help bring to its attention additional information which aids it in the decision-making process. Some intervenors are adequately funded by the voluntary contributions of their constituents, but others are either unable to participate in its proceedings or do so under the constraints of significant financial hardship. Accordingly, the Commission has decided to permit TURN to use this extra space in the PG&E billing envelope to solicit funds for consumer advocacy.

The Commission cannot assume responsibility for the efficacy or financial accountability of TURN. However, the Commission has previously found that TURN has demonstrated an ability to participate effectively in the its regulatory

procedings, and that such participation by TURN involved a significant financial hardship. Furthermore, in consideration for the use of this space in the PG&E billing envelope TURN has made the following commitment: first, that it will undertake to represent PG&E's residential customers in one or more of the regulatory proceedings listed below; second, that it will account for the receipt and disbursal of funds obtained through this solicitation, and will make such information available to the public on an annual basis.

If you would like to have more information about TURN you may write directly to it the address shown below.

2. Applications and Other CPUC Proceedings Affecting PG&E's Residential Gas and Electricity Tariffs.

[A list is provided here of those presently known PG&E applications or other cases that will have a significant effect on the customers' utility bill, and which will be heard within the next 12 months. A brief description of the issues presented and the effect on the residential customers' bill (if known) is also included.]

----------Detach Here ----------

Residential Consumer Advocacy Organizations.

I wish to contribute $ to TURN (TURN is a non-profit tax exempt corporation, your contribution is tax deductible).

Name of Contributor _____

Street _____

City _____ Zip _____

* * * * *



## EXHIBIT C

**Proposal for a Mechanism to Select Residential Consumer Groups for Inclusion in the Consumer Advocacy Checkoff.**

### I. Policy Considerations

The Commission is ultimately responsible for selecting residential consumer groups for inclusion in the Consumer Advocacy Checkoff. Such a selection is necessary for two reasons: first, there may not be room in the insert to list all groups that might wish to be included; second, there should be some screening to exclude those who cannot demonstrate a commitment to the purpose of the program, i.e., significant advocacy in PG&E regulatory proceedings on behalf of a residential consumer constituency.

The Commission's screening responsibility, however, cannot be extended too far. The Commission cannot and should not guarantee the efficacy, qualifications, or financial responsibility of those groups participating in the program. All that the Commission can reasonably be expected to do is to determine whether a group has made a satisfactory threshhold showing concerning its legal structure, its constituency, and its understanding of, and commitment to effective participation in CPUC regulatory proceedings involving PG&E. The mechanism for making this determination should be clear and simple, for neither the Commission nor potential participants would wish to devote inordinate time and energy to a matter that is merely ancillary to the advocacy itself.

### II. Legal Considerations

In its previous decisions on the subject of bill inserts the Commission has extensively discussed the legal issues involved. Any proposal for a mechanism to select participants for the Consumer Advocacy Checkoff should be responsive to this prior legal analysis. In particular, the mechanism should involve an appropriate exercise of the Commission's powers to advance a reasonable state interest. It may be taken for granted that the Commission has the power, and indeed the duty, to exercise a "stewardship" over the extra space on behalf of the PG&E

ratepayer. Providing access to that extra space, for the purposes urged in this complaint advances a valid state interest, to wit, enhancing the effectiveness of regulatory proceedings. Furthermore, because the extra space has a real economic value, a value that is being used in this proposal for the benefit of the Consumer Advocacy Checkoff, the Commission has the right to decide which groups are most qualified for participation in a program which, by its very nature, has limited space.

If the Commission's power to exercise its discretion and select participants for the Consumer Advocacy Checkoff is granted, the *constraint* on that power would surely be the Constitutional protections of free speech. In short, the Commission cannot act to censor the content of printed material in the extra space, nor can it judge in advance the merits of a potential participant's planned intervention in its regulatory proceedings.

**III. Proposal.**

The Commission could require that any groups wishing to participate in the Consumer Advocacy Checkoff file a petition (analagous to the petition required for PURPA qualification under the Commission's current rules). Such a petition would show that the petitioner had a legal structure—perhaps a non-profit corporate structure—and represented a constituency made up of residential customers of PG&E. The petitioner would also be asked to show an understanding of the Commission's regulatory process and to demonstrate an ability to engage attorneys, expert witnesses, and other advocates in pursuit of specific goals. As a precondition of this pro forma showing of technical competence, the Commission might require that an applicant have participated in at least one prior CPUC regulatory proceeding.

In order to establish minimum standards of financial responsibility, the Commission could require that each petitioner agree to file for public inspection a year-end report on its receipts and disbursements under this program. Once the program was actually underway, a designated representative of the Commission (perhaps the Public Advisor) would be responsible for receiving and tallying all contributions and forwarding them to their designated recipients. This would



provide an additional control over the funds received through this program and would permit an allocation of program expenses in proportion to tallied receipts.

All costs associated with the program—i.e., the printing of inserts and their handling by PG&E and all administrative costs incurred by the Commission or its representatives—would be borne by the participants as "overhead." The program would be viewed as a two-year experiment, with three insertions per year. Upon completion of the experiment the Commission would decide whether or not it should be extended further.

**APPENDIX H**

**Decision 83-04-020 April 6, 1983**

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CENTER FOR PUBLIC INTEREST LAW and ROBERT L. SIMMONS,
*Complainants,*

vs.

SAN DIEGO GAS & ELECTRIC CO.,
*Defendant.*

**Case 82-03-05 (Filed March 11, 1982)**

ROBERT C. FELLMETH, Attorney at Law, for Complainants.

RANDALL W. CHILDRESS, Attorney at Law, for Defendant.

ALBERTO GUERRERO, Attorney at Law, for the Commission staff.

## OPINION

### Summary

By the following decision we grant in a modified form the proposal of complainants, the Center for Public Interest Law (Center) and Robert L. Simmons to allow access to San Diego Gas & Electric Company's (SDG&E) billing envelope extra space, on an interim basis, for two purposes: First, to allow for the solicitation of funds and members sufficient to permit holding an election by ratepayers of a consumer representative organization designated by complainants as the Utility Consumers Action Network (UCAN); and, second, to permit UCAN, once it is elected, to insert informative printed material. Both uses are restricted as described within. In addition we grant SDG&E continued access to the extra space.



### Background

In December 1981, we issued Decision (D.) 93887 as a result of the general rate case filed by Pacific Gas and Electric Company(PG&E) early that year. After rehearing, the decision was modified by D.82-03-047 issued March 2, 1982. A petition for writ of review of these decisions was filed by Toward Utility Rate Normalization. This petition was denied by the California Supreme Court on August 13, 1982.

One of the issues in that case was the appropriate use of "extra space" in the utility's billing envelope. We defined extra space as that space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, which can be used for added materials without incurring additional postage costs. In other words, the "space" is measured in terms of available weight.[1] Thus, whenever the bill and any necessary legal notices, if there are such, together weigh less than one or more full ounces, then there is "extra space" for added materials. At the time of the PG&E case, that company was including a newsletter in the extra space. The newsletter contained utility political advertising as well as information about conservation, cost-saving measures, Commission action, and the like.

We held that the extra space belongs to the ratepayer since the cost of envelopes and postage is included in the development of the utility's revenue requirement.

We also held that the extra space has economic value which belongs to the ratepayers. We found that when that space is used by the utility for its own advertising inserts instead of being used for some other purpose (such as selling it to advertisers or conservation information), the ratepayers forego savings from advertising revenue or savings generated by conservation information while the utility may capture the value of such savings thereby recovering an "opportunity cost" from the ratepayers. The minimum value of the opportunity cost recovered by the utility is the fourth class bulk mail rate that the utility would otherwise have to pay to send out such inserts.

[1] The postage rate is charged for increments of one ounce, fractions of an ounce being charged at the next higher rate. (See Exhibit 31.)

We declined, however, to ban insertion of the newsletter, finding that it did have information from time to time that was useful to the ratepayers and that this benefit must be weighed against the opportunity cost borne by those ratepayers. We decided that before taking action we needed more information about how that balance should be struck and/or what permissible means of more efficiently using the extra space could be employed. After listing several possibilities and our concerns about each, we concluded by stating:

> "We invite TURN [Toward Utility Rate Normalization, the protestant on this issue] or any other interested party to file a complaint with this Commission with a proposed solution to this 'extra' space problem. The complaint would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the 'extra space' more efficiently for ratepayers' benefit. We caution, however, that we will not lightly adopt such an order and that the considerable First Amendment problems must be fully addressed in such complaint." (D.82-03-047 at pg. 8.)

By the broad language of the above invitation we made it clear that our conclusion about billing envelope extra space applied to all utilities we regulate. Apparently, in response to that invitation, the Center and Simmons filed with the Commission a document which they captioned "Petition to the Public Utilities Commission for Modification of San Diego Gas & Electric General Rate Decision". Our Docket Office recharacterized it as a complaint upon receiving it for filing. The document details a means of giving ratepayers use of the extra billing envelope space of SDG&E. The proposal advocates using the extra space to solicit funds and hold an election for the creation of a corporation called the San Diego Utility Consumers Action Network, Inc., or "UCAN", to represent SDG&E ratepayers before the Commission and elsewhere, and to provide the ratepayers with information concerning matters UCAN determines may affect their interests.

Following a period for public comment, hearings were held on the complaint in the Federal Building in San Diego on September 13 and in the Commission's Courtroom in Los



Angeles on September 14 and 15, 1982 before Administrative Law Judge (ALJ) Colgan. The matter was submitted on September 15, 1982 pending receipt of certain late-filed exhibits and briefs. The last of these items was received in late February 1983, when a disputed discovery matter was finally resolved.

In April 1982, SDG&E filed a motion to dismiss the complaint. We will deny the motion[2] on each ground cited. First, since this is not a complaint as to the reasonableness of rates or charges, SDG&E's claim regarding insufficiency on that ground is without merit. Second, the claim that allegations in the complaint are vague and ambiguous is also without merit. The complaint is quite specific. Third, contrary to SDG&E's claim, the complaint does set forth an act or thing not being done in violation or claimed to be in violation of an order of the Commission as required by Public Utilities (PU) Code Section 1702. The complaint alleges a failure to afford SDG&E ratepayers access to the extra space which we found to belong to them in D.82-03-047. Finally, there is no question that the Center and Simmons have standing to bring this action. They are SDG&E ratepayers; nothing further need be shown.

**The Proposal**

The complainants in this matter are an individual SDG&E ratepayer, Simmons, and the Center, which describes itself as "an active member of the San Diego community, composed primarily of San Diego residents". The Center also states that it is a part of the University of San Diego composed of five staff members and about 50 graduate and law students which monitors "the activities of 60 [California] boards, commissions, and departments with entry control, rate regulation, or related regulatory powers over business and trades".[3] It also publishes the "California Regulatory Law Reporter".

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[2] We will also deny SDG&E's motion, filed January 10, 1983, to strike various parts of complainants' Reply Brief which SDG&E claims constitute improper argument and misconduct. This decision gives no weight to unsubstantiated arguments or unsupported claims. It relies only on evidence properly before the Commission. We will leave the record as it stands.

[3] Complaint, page 22.

The proposal the Center and Simmons advocate is set forth in detail as Exhibit 14, which is a modified version of Appendix A of the complaint.[4] In brief, it calls for the creation of a voluntarily funded nonprofit corporation with a board of directors. Each director represents a district[5] within SDG&E's service area and is to be elected by UCAN members from the appropriate district. Any SDG&E customer of 16 years of age or older[6] who has contributed $4 to UCAN may vote for the district director. Once the board is established, it is to hire, direct, and supervise an executive director who will employ a staff.

The stated purpose of UCAN is to represent the interests of SDG&E's residential and small business customers before regulatory agencies such as the Commission, to educate the ratepayers, and to assist them in resolving individual complaints. Neither Simmons nor the Center propose any role for themselves in any phase of this proposal beyond their advocacy in the present proceeding.

The enumerated functions appear to parallel the functions of the Commission staff. However, the Center offered witness testimony showing that UCAN would not duplicate staff's function. Further, as we elaborate below we continue to believe that consumer advocacy is useful to the development of a full record.

**Need for Consumer Advocates in SDG&E Proceedings**

Both parties have addressed the issue of need in some detail in their post-hearing briefs. Neither contends that consumer advocates have no place in SDG&E's proceedings. Simmons and the Center identify various problems which they claim are not resolved by the current system. SDG&E points to the Commission's present complaint procedure, the work of our Consumer Affairs Branch, and our intervention procedures

[4] Both Exhibit 14 and Appendix A appear to be closely patterned after California Assembly Bill (AB) 2931 (which was unsuccessfully introduced during the 1982 session) and the Wisconsin Citizens Utility Board (CUB) statutes (see hearing Exhibit 25). These measures and at least three bills of similar intent pending before the current session of the Legislature (AB 45, Chacon; SB 340, Greene; and SB 399, Rosenthal) differ from the UCAN proposal primarily in their statewide scope.

[5] The boundaries of these districts are not specified by Exhibit 14.

[6] A small business corporation may also be a member.



(which include a possibility for compensation) as adequate to meet consumer's needs.

There is no question that participation by representatives of consumer groups tends to enhance the record in our proceedings. The California Supreme Court reminded us of that in deciding *Consumers' Lobby Against Monopolies (CLAM) v. Public Utilities Commission* (1979) 25 C 3d 891 which found that the Commission has jurisdiction to award attorneys' fees and costs to consumer representatives under certain circumstances. In reaching this conclusion the Court noted:

> "[T]he staff is subject to institutional pressures that can create conflicts of interest; and it is circumscribed by significant statutory limitations, such as lack of standing to seek either rehearing (Pub. Util. Code, §1731) or judicial review (Id., §1756) of Commission decisions." (25 C 3d 891, 908.)

We hasten to add that our staff is a dedicated, professional, highly competent one. The observation of the Court merely points out an inevitable facet of the unique position of our staff. There can be no denying that the principal representative of the residential and small business ratepayer is in fact the staff, whose job it is to challenge a utility's showing and recommend the minimum rates necessary to ensure adequate service and provide a reasonable return to the utility. The staff, however, may not pursue appeals. Thus, if residential and small business ratepayers are to be fully protected, it is necessary that they be represented in our proceedings. The Legal Division agrees with us, since its post-hearing brief supports the UCAN concept.

Furthermore, while we believe that the opportunities for compensation for participation in our proceedings help assure the development of a full and fair record, we recognize the merit of the Center and Simmons' contention that such opportunity may seem illusory to an individual ratepayer. What the complainants propose is another alternative, which relies neither upon increased funding through rates nor necessarily upon compensation under one of our present procedures. It appears that there are many ratepayers in SDG&E's service area who would relish the opportunity of belonging to an organization which could afford to hire people with technical

expertise to represent their particular interests in proceedings as technical as most of our major cases are. In fact, many of these ratepayers have written to us to express their support of this UCAN proposal.

The real question is not whether a need for consumer advocacy exists or whether the UCAN proposal is a good idea, but whether use of extra space in the billing envelope represents an efficient use of the extra space[7] which benefits SDG&E ratepayers. In addition, we must determine if there are any legal or policy considerations which forbid its implementation.

**Scope of this Case**

During the hearing representatives of Sourthern California Gas Company and Southern California Edison Company lodged written motions to intervene (RT Vol. 1, pg. 2) on the ground that the resultant decision might affect all utilities within the State, including them. For the same reason, counsel for SDG&E argued that this complaint should be consolidated with a statewide Order Instituting Investigation (OII) (RT Vol. 1, pg. 8).

The motions were properly denied (RT Vol. 2, pg. 145). This complaint only involves SDG&E and its ratepayers and in no way affects the rights or duties of other utilities. We also reject SDG&E's position for the similar reason that no statewide remedy is proposed and none is implicit or necessary to the disposition of this complaint.

**Merit of the Proposal**

We find complainants' proposal appealing. One of our primary concerns in determining how to best give the ratepayers the benefit of extra billing envelope space is assurance

[7] There is no question that "extra space" does exist in SDG&E's billing envelopes. SDG&E regularly includes an insert called "Lite Lines" along with its bills. A witness testified (RT 279-282) that she took a recent billing envelope which included a bill, a return envelope, a 2-page Lite Lines, and another insert on energy saving to the U.S. Post Office and added to it a mock-up UCAN insert. The post office weighed the entire packet and charged 20¢ for a stamp—the present minimum first class rate. Furthermore, the record shows that SDG&E has the capacity to insert at least six items into its billing envelope (See Exhibit 9).



that it can benefit the greatest number of ratepayers and not just certain individuals or interest groups. The best way this society has devised for arriving at such a result is the democratic election process. This proposal limits voting to "members"; however, membership requires only three things: (a) at least 16 years of age, (b) status as an SDG&E residential or small business consumer (which includes persons in master-metered buildings), and (c) a contribution of at least $4 in the preceding or current fiscal year (Exhibit 14, Section 7022). While we may not have selected these precise criteria ourselves, they appear to be nondiscriminatory and reasonably related to the fair representation of SDG&E ratepayers.

We find the method of starting up to be of some concern. Contrary to the opinions expressed by some witnesses and by SDG&E, this proposal would not give the Center any role in UCAN. Rather, the proposal would have each Public Utilities Commission commissioner appoint one director to the first corporate board (Exhibit 14, Section 7072(a)). The function of this initial board of directors is to set in motion those things necessary to holding an election of a new board. As a precaution, these initial appointees are ineligible to be elected to such positions for three years (Exhibit 14, Sections 7081(a) and 7072(b)(6)). While the apparent intent of the proposed selection process is to assure fairness, we believe it inappropriate for the Commission to select the interim board, and we decline to do so. The proponents might wish to select some other person or entity to make the selections.

The proposal contemplates election by district. Exhibit 14, Section 7083, and other sections refer to State senatorial districts. This reference is not appropriate to this proposal, but the district concept is a good one. The initial board ought to select boundaries which encompass all SDG&E consumers and which create districts of approximately equal populations.

An appealing aspect of the present proposal is that it is supported by voluntary contributions. Both the costs of operation of the UCAN corporation and any costs incidental to adding UCAN-printed matter to the billing envelope are to come from this source (Exhibit 14, Sections 7061 and 7062).

In addition to the attributes described above, we note that UCAN's duties are restricted to nonpartisan, utility-related endeavors (Exhibit 14, Section 7037); it is required to make all its records, books or other data available to any member (Exhibit 14, Section 7040); its board is bound by strict conflict of interest provisions (Exhibit 14, Section 7071), and campaign contribution restrictions (Exhibit 14, Section 7086).

We greatly appreciate the testimony of Michele Radosevich, former state senator from Wisconsin and present public information director for its statewide CUB. Her testimony (RT Vol. 3, pgs. 300-346) reassured us that most of the problems which usually come to mind, such as extra cost of utility insertion of materials, can be and generally are resolved without undue conflict. The "wording" conflict Radosevich described (RT Vol. 3, pg. 318 et seq.) seems to us to imply some First Amendment problems. We think they would be avoided if the content of messages of UCAN or the utility were simply left up to each proponent.

From Radosevich's testimony and the Wisconsin CUB statute (Exhibit 25), we note that the UCAN proposal is somewhat different from the CUB in Wisconsin. The Wisconsin CUB, which serves all public utility ratepayers in proceedings involving all public utility companies participates primarily in major rate cases and in some cases involving policies of statewide significance analogous to our OII cases.

The UCAN proposal contemplates detailed attention to a single utility, including intercession in consumer complaint issues. We do not know if this consumer complaint aspect is necessary. We believe UCAN can best decide this issue for itself based on its own experience. UCAN can also decide for itself whether and how to devote its resources to rulemaking or other proceedings where the interests of SDG&E ratepayers may be at stake.

Radosevich also testified that CUB did not increase the length of rate case hearings, did not act as an obstructionist (RT Vol. 3, pg. 311), did not cause a great deal of extra cost for the utilities (RT Vol. 3, pg. 314), has been praised by the state's Public Service Commissioners for its beneficial work



(RT Vol. 3, pg. 315), and has been able to successfully explain the legitimacy of a utility's action to consumers when consumers were skeptical of the utility's explanation. The last factor is of no small consequence. Consumer skepticism is extremely high among SDG&E ratepayers. This skepticism has been exacerbated by sharp increases in SDG&E's rates. Accordingly, UCAN might well improve the public's view of SDG&E.

For these reasons, we will adopt an order requiring SDG&E to permit UCAN access under conditions we will describe. UCAN can only be fully functional after an elected board is in place. However, access should also be granted to the appointed board for a reasonable time so that it may solicit start-up funds and hold an election. We believe twelve months is sufficient for this phase. We also believe the baseline criteria established by this proposal for triggering an election—3,500 members and $15,000 in contributions—assure adequate consumer interest. If the criteria are met and a board is elected, eligibility for access shall continue until two years from the effective date of this order unless we determine otherwise.

The purpose of such limitation is to permit us to monitor the use of the extra space in SDG&E's billing envelopes. We must be certain that the extra space is used in a manner which clearly benefits ratepayers. Although only the UCAN proposal is before us now, it certainly does not represent the only possibility for effective use of that space. For instance, the check-off proposal suggested by Commissioner Gravelle in his concurrence to the TURN attorneys' fee case in D. 88532 (1978), 83 CPUC 471, might be equally or more effective. That proposal would have the Department of Consumer Affairs certify, under legislative guidelines, a list of consumer organizations which would appear on utility bills. The customer would then have the opportunity to pledge and pay any voluntary contribution to one of those organizations along with his or her utility bill payment. Should this proposal or other proposals be brought before us, we will examine the feasibility and benefits of each at that time.

The UCAN proposal probably does not cover every possible contingency and our criteria for access may require future

changes. We are willing to institute this experiment because we are convinced that this use of the extra envelope space is a basically sound, reasonable, and useful one that offers SDG&E's consumers an opportunity for more direct participation in our proceedings than they have had in the past. Beyond that, we believe this proposal will improve the relationship between the utility and the community by providing another source of information to the ratepayers. We are confident that SDG&E and UCAN will work together in good faith to overcome any problems and permit the ratepayers the opportunity to experience the full implementation of UCAN.

If insurmountable problems arise, we may have to issue further clarifying orders. We hope this will not be the case. We want the program to work and we want the parties to make it work. We believe they will.

**The Nature of the Ratepayers' Right**

We have stated that the extra space belongs to the ratepayers. In so doing, we are not so much describing a traditional property right as an equity right. We are not saying that everything paid for with ratepayer money is the sole property of the ratepayer. Rather, we are saying that the *reason* the ratepayers pay for the billing envelopes and postage is that those costs are an expense necessary to the operation of the utility. So, what the ratepayers are legitimately paying for is the conveyance of their bills and occasional legally mandated notices. Since these documents together do not generally add up to one ounce and the postage rate is calculated in increments of one ounce, the ratepayer has paid for some empty space (or, more exactly, some unused weight[8]).

It is the structure of postal rates that allows this issue to exist. If the rates were structured so that SDG&E only paid for weight actually used, then we would probably not permit the utility to add any inserts which would increase the cost of postage, and thus ratepayer cost.

[8] It may have occurred to the reader that the utility could moot this issue by substantially increasing the weight of its bills; however, we do not expect such an occurrence nor would we find it acceptable.



However, extra space (unused weight) does exist in SDG&E's billing envelopes and SDG&E uses it. This Commission believes that equity requires that the extra space be used in the manner most beneficial to the ratepayers who have paid for it. We are certain that SDG&E's use of the extra space is often useful to its ratepayers and we think it reasonable for SDG&E to have continued access to that space. However, we do not believe that access only by SDG&E to this space assures the most ratepayer benefit. Nor do we believe that totally banning any access to the extra space would be the most beneficial use. Rather, it appears that the most beneficial use of this space is one which provides the ratepayers with information.

We conclude, for the reasons described above, that it is appropriate for UCAN to have limited access to the extra space in the SDG&E billing envelope. Actual insertion of material in the envelope will commence only after we have received notice that an organization which conforms to the terms of this decision has been established and selection of an interim board has been completed. Copies of the articles of incorporation, bylaws, and list of interim board members and method by which they were selected should accompany this notice. The articles and bylaws should adhere to the following principles included in the UCAN proposal:

a. Nondiscriminatory membership criteria reasonably related to the fair representation of residential and small business ratepayers of SDG&E.

b. Democratically selected board members.

c. Representation on a basis of districts of equal population to assure community ties and proportionate representation.

d. Representation of residential and small business ratepayers meeting membership criteria.

e. A policy of open records and accountability to the membership via annual reports, meetings, and similar activities.

f. Strict conflict of interest regulation and campaign contribution restrictions for board members.

Once UCAN is established, the organization will be allowed prompt access to the extra space 4 times a year for the next 2 years. In the notice described above, UCAN should identify the months during which it plans to insert its material in the billing envelope. SDG&E should accommodate (sic) UCAN's schedule. We expect that any practical problem will be solved through good faith negotiations between the parties.

This limitation should in no way frustrate UCAN's objectives since it is free to supplement its bill inserts with other means of communicating with ratepayers—e.g., media, meetings, membership newsletters, etc. Since one function of UCAN is to present ratepayers with its view of SDG&E's operations, we think SDG&E should continue to have an opportunity to provide ratepayers with information it deems appropriate.

Departing from the proposal in Exhibit 14, we will not undertake to control the content of the matter inserted in any way. The only restrictions shall be that priority must be given to the billing and any legally mandated notices to customers, that UCAN shall reimburse SDG&E for any handling costs SDG&E incurs beyond its usual costs of billing as a result of adding UCAN's inserts, and that each party's inserts shall clearly identify their source. Further, all inserts should clearly state that the contents have neither been reviewed nor endorsed by this Commission.

We must add that our support of this UCAN proposal has considered the legality (constitutional and statutory) of such action and the implications of such action in light of the various pending and past bills to create a statewide CUB. Our conclusions regarding these matters are set out below.

**Legality of Commission Action**

The leading U.S. Supreme Court cases on the constitutionality of bill insert regulation are *Consolidated Edison Co. of New York v Public Service Commission of New York*



(1980) 447 US 530 (Con Ed) and *Central Hudson Gas & Elec. Corp. v Public Service Commission of New York* (1980) 447 US 557 (Central Hudson). These companion cases concern attempts by the New York Public Service Commission (PSC) to prevent utilities from including certain kinds of inserts in their billing envelopes. The former case involved political advertising in support of nuclear power and the latter involved advertising promoting the use of electricity. The Supreme Court found that the First Amendment to the U.S. Constitution protected each of these types of expression.

The issues are not, as SDG&E urges, analogous to the one before us here. Adoption of complainants' proposal does not deny SDG&E the right to free speech. At most, it is a "time, place, or manner restriction" which the Court specifically found to be acceptable if there is a showing of compelling state interest and the restriction is not based (as it was in *Con Ed* and *Central Hudson*) on the content or subject matter of the speech. The State interest, of course, is the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete consumer understanding possible of energy-related issues. Furthermore, our action is distinguishable from the cited cases in that we do not intend to bar or regulate SDG&E's use of its portion of the extra space. Indeed, adoption of the UCAN proposal should promote First Amendment values by expanding the views offered to SDG&E ratepayers.

SDG&E also suggests that *Con Ed* stands for the proposition that billing envelopes are the property of the utility and not the ratepayers. Our reading of that case reveals nothing to indicate that that view is accurate. The issue is only addressed, in fact, in Justice Blackman's (sic) dissent where he suggests that if such a property right argument were made in the future, it might achieve the end New York's PSC was seeking. In any case, as we explained above, we do not rely on a traditional property right analysis to reach our conclusion. We base it on equitable considerations.

SDG&E also claims that the Commission's allowing access as proposed might be construed as constitutionally impermissible "government favoritism for certain political speech over

another". We reiterate that we simply are granting ratepayers access to the billing envelope for communication with other ratepayers and in so doing we are neither favoring nor regulating any form of political speech. Our action grants access to both SDG&E and UCAN, an organization run by a democratically elected board of directors.[9] All qualified consumers willing to pay the nominal fee of $4 may participate[10] in choosing these directors and may, likewise, oust the directors following democratic procedures, if the directors fail to represent them. By allowing both SDG&E and UCAN access, we clearly avoid "government favoritism".

Finally, in response to SDG&E's claims that the UCAN proposal violates Public Utilities Code Section 532, we disagree. We are not favoring one group over another in allowing access to the extra space in SDG&E's billing envelope. The "privilege" of access under the proposal is uniformly extended to all SDG&E ratepayers, consistent with Section 532.

The federal Public Utilities Regulatory Policies Act of 1978 (P.L. 95-617, 16 U.S.C. Section 2601 et seq.) (PURPA) is a clear expression of the federal government's concern that consumers' interests be adequately represented in state rate proceedings involving electric utilities. Toward that end PURPA sets forth certain requirements for compensation of consumer participants. We enacted Commission Rules of Practice and Procedure 76.01 et seq. in compliance with these PURPA requirements.

PURPA, however, is not the only legal basis upon which we may act in extending participatory opportunities to consumers.

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[9] There is also access for a limited time by the interim board of directors. As explained above, however, this appointed board's functions are both temporary and restricted.

[10] In addition to individual consumers, the proposal also includes representation of small business consumers. While the term "small business consumers" has not been defined in the present rules, we expect that UCAN's board of directors will define it so as to include all businesses which are small enough so that it could reasonably be expected that it would not be economically feasible for them to represent themselves in CPUC proceedings. Such definition will assure the widest reasonable representation.



This Commission, unlike those of states such as Wisconsin, derives its authority directly from the State Constitution, See California Constitution, Article XII. Section 6 of Article XII broadly grants the Commission power to "establish rules . . . for all public utilities subject to its jurisdiction." Our adoption of rules under which SDG&E must permit billing envelope access is certainly within the scope of that constitutional authority.

In addition, the Legislature has enacted three statutes in the PU Code which bear directly upon the propriety of our action here.

The first, Section 701, confers upon this Commission the right to "do all things, whether specifically designated in [The Public Utilities Act] or in addition thereto, which are necessary and convenient" in the supervision and regulation of every public utility in California. This grant of authority has traditionally been liberally construed by the State Supreme Court. These additional powers exercised by this Commission simply "must be cognate and germane to the regulation of public utilities" *Southern California Gas v. PUC* (1979) 24 C. 3d 653, 656.

The second relevant section of the PU Code is Section 770(a) which permits this Commission, after hearing, to "[a]scertain and fix just and reasonable . . . regulations . . . to be . . . observed, and followed by all electrical, gas, water, and heat corporations."

The final pertinent section is Section 761 which states:

> "Whenever the commission, after a hearing, finds that the . . . practices . . . of any public utility . . . are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the Commission shall determine and, by order or rule, fix the rules . . . to be observed."

We believe the present practice of SDG&E with respect to its billing envelope extra space is inadequate. Therefore, an order to change this practice is appropriate under Section 761.

The background of constitutional, statutory, and case law described above illustrates, beyond question, that this Commission may legally act in the manner proposed in the complaint before us.

**Effect of Legislature's Action**

Finally, we address the issue of the effect of our taking such legally permissible action when the Legislature failed to pass CUB legislation during the last session and has similar legislation presently pending before it. We conclude our action here is distinct from all legislative proposals to date.

It must be remembered that the precipitating factor in the present proceeding was this Commission's December 1981 invitation to interested parties to file a complaint with us with a "proposed solution to the 'extra' space problem". (D.93887 as modified by D.82-03-047.) We believe that the proposed use of SDG&E's extra space offers more benefit to SDG&E's ratepayers than the present use.

Legislation to date has called for statewide implementation of the CUB concept. These bills cover every electricity, water, natural gas, and telephone public utility in the State. The narrowness of the complaint before us removes it from legislative contemplation since it is not of statewide consequence. At this time, we cannot predict what actions this legislature or future legislatures might take with respect to CUBs. Until such a time as CUB legislation may be enacted, we cannot assess how the UCAN proposal might integrate or conflict with a legislatively-established organization. If and when that event occurs, we would expect the parties to this proceeding to notify us of any modifications to this decision which may be necessary.

**Findings of Fact**

1. Extra space exists in SDG&E's monthly billing packets.

2. SDG&E is presently the only user of its billing envelope extra space.

3. This complaint proposes the formation of UCAN as a nonprofit corporation made up of SDG&E residential and small business ratepayers using SDG&E billing envelope space to communicate with ratepayers about issues related to SDG&E.

4. This extra space represents economic value that is lost to SDG&E ratepayers when not used to their benefit.



5. Access to the extra space by UCAN would benefit SDG&E's ratepayers.

6. Continued access by SDG&E would also benefit SDG&E's ratepayers.

7. SDG&E has the mechanical equipment necessary to include a UCAN insert in its billing packets.

8. The past and pending CUB legislation contemplates a program with statewide implications.

9. Unlike legislative proposals to date, UCAN would focus its efforts exclusively on matters related to SDG&E.

10. UCAN is constituted to assure nonpartisan solicitation and to represent the views and concerns of San Diego ratepayers.

11. The complaint did state a cause of action under PU Code Section 1702.

12. The relief requested would have benefit to this Commission in the conduct of proceedings affecting SDG&E ratepayers.

13. Use of the extra billing envelope space by UCAN is a more effective use of the benefit of economic value of that space for SDG&E's ratepayers than not doing so.

**Conclusions of Law**

1. The California Constitution has endowed this Commission with broad rulemaking power.

2. The Legislature has granted this Commission broad statutory authority to regulate public utilities.

3. The Center's and Simmons' relief is specifically related to improvement of the operations of SDG&E and is within the constitutional and statutory jurisdiction of this Commission.

4. This Commission possesses the authority to grant the relief requested.

5. SDG&E's constitutional rights are not impeded by UCAN access to billing envelopes.

6. The motion of SDG&E to dismiss this complaint should be denied.

7. The motions of Southern California Gas Company and Southern California Edison Company to intervene were properly denied.

8. The motion of SDG&E to strike certain parts of complainants' reply brief should be denied.

9. This proposal does not affect the operations or interests of Southern California Gas Company or Southern California Edison Company.

## ORDER

IT IS ORDERED THAT:

1. The motion of San Diego Gas & Electric Company (SDG&E) to dismiss Case 82-03-05 is denied.

2. The Administrative Law Judge's Ruling denying the motions to intervene filed by Southern California Gas Company and Southern California Edison Company is affirmed.

3. The motion of SDG&E to strike portions of complainants' reply brief is denied.

4. SDG&E will make available to the Utility Consumers Action Network (UCAN) access to extra space in SDG&E's billing envelopes as described in this decision.

5. Access shall be provided once UCAN files a notice with this Commission indicating that an organization which conforms to the terms of this decision has been established and selection of an interim board has been completed. The notice should include copies of UCAN's articles of incorporation, bylaws, list of interim directors, and a description of the method by which such directors were selected.

6. Access shall be provided to the appointed board for a period of up to twelve months. This access shall be



provided four times during the twelve month period. Such times shall be selected by UCAN and identified in the notice described above. This appointed body's use of the extra space shall be limited to the inclusion of information aimed at soliciting members and funds sufficient to permit the holding of an election, and then information about the election.

7. Upon election of a board of directors, or upon the expiration of one year from the effective date of this order, whichever is first, access by the appointed board shall cease. If a board has been elected it shall then be provided with access to the extra space four times a year. UCAN shall provide SDG&E with reasonable notice of the months during which it desires access.

8. SDG&E shall continue to provide UCAN with access until two years from the effective date of this order unless otherwise extended or terminated by order of this Commission.

9. All extra space inserts shall clearly identify their source and indicate that their contents have neither been reviewed nor endorsed by this Commission.

This order becomes effective 30 days from today.

Dated April 6, 1983, at San Francisco, California.

I will file a concurring opinion.

/s/ LEONARD M. GRIMES, JR.

*President*

LEONARD M. GRIMES, JR.

*President*

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL

*Commissioners*

COMMISSIONER LEONARD M. GRIMES, JR., Concurring:

I concur. I believe that today's decision has great promise for both SDG&E and its ratepayers. If UCAN succeeds, San Diego ratepayers will have an additional means of participating in our decision-making process. To be effective, however, intervenor groups like UCAN must do more than make passionate or inflamatory pleas to the Commission. They must play the game effectively by supporting their views with hard facts, experts analysis, and realistic solutions. Meeting this challenge will not be easy, but, as demonstrated by the Center's efforts in this proceeding, it can be done.

For SDG&E, this order could represent another opportunity to solve problems in cooperation with ratepayers. UCAN, for example, could help alert SDG&E to ratepayer problems before they reach the crisis stage and thereby allow the company to take responsive action. In addition, SDG&E could work closely with UCAN on issues such as the Federal Natural Gas Policy Act where both the company and its ratepayers have a strong interest in keeping gas costs at affordable levels.

To make the most of this opportunity, the management of SDG&E should assume an attitude which is flexible and cooperative toward UCAN. It should recognize that, today, ratepayers must be involved in the regulatory process and any effort real or perceived to obstruct such involvement can only increase the level of frustration among them. SDG&E can play a leadership role in reducing this frustration.

Finally, even with expert intervenor participation, the Commission Staff will continue to be the indispensable part of our state regulatory process. For all practical purposes, intervenors will serve to only complement the work of our professional staff; they cannot replace it.

H. SAVASAH
*Asst. Executive Director*
*Public Utilities Commission*
*State of California*

/s/ LEONARD M. GRIMES, JR.
Leonard M. Grimes, Jr.,
*Commissioner*

San Francisco, California
April 6, 1983



**APPENDIX I**

**STATE OF NEW YORK**
**PUBLIC SERVICE COMMISSION**

COMMISSIONERS:

Paul L. Gioia, Chairman
Edward P. Larkin
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead*
Rosemary S. Pooler*

CASE 28655— Proceeding on Motion of the Commission to Examine Ratepayer Access to Utility Billing Envelopes and the Concept of a Citizens' Utility board.

## STATEMENT OF POLICY GOVERNING THE ACCESS OF INTERVENOR ORGANIZATIONS TO THE EXTRA SPACE IN THE UTILITIES' BILLING ENVELOPES

**(Issued: May 14, 1984)**

BY THE COMMISSION:

### INTRODUCTION

In the last decade, as a result of escalating utility prices, consumers have expressed concern about the adequacy of consumer representation in the utility regulatory process. To strengthen this representation, the Legislature has provided funding for utility intervention activities to the Consumer Protection Board (CPB)[1] and the Department of Law, and has increased protections for gas and electric consumers. The Consumer Services program at the Department of Public Service also has been expanded.

* Agreeing in part and disagreeing in part with a Separate Statement attached.

[1] Approximately $1.58 million of the Consumer Protection Board's $2.27 million 1984-85 budget is allocated for utility intervenor activities.

In addition to these initiatives, support has emerged for the creation of a Citizens Utility Board (CUB),[2] a not-for-profit, voluntary membership organization with a democratically elected board of directors to represent the interests of residential ratepayers. Under this concept, a CUB would be permitted to use the extra space in utility bill mailings to communicate with ratepayers and solicit membership.

CUBs have developed in three states. Legislation has been enacted in both Illinois and Wisconsin which provides bill envelope access to statewide CUBs and establishes the organizations' structure and purpose. In California, the Public Utilities Commission (CPUC), without legislation, has permitted a CUB access to the bill mailings of San Diego Gas and Electric Company (SDG&E). The CPUC has also allowed a not-for-profit consumer advocacy organization, Toward Utility Rate Normalization (TURN), access to the bills of Pacific Gas and Electric Company (PG&E).

Although legislation has been proposed in New York, the Legislature has not yet enacted a CUB proposal. Consequently, in 1983, Governor Cuomo asked us to consider possible administrative action to facilitate the development of a citizen intervention organization. In response to the Governor's request, staff made a preliminary evaluation of the desirability of developing a CUB in New York and recommended that on balance the benefits to New York's ratepayers appeared to outweigh the possible disadvantages.[3]

Based on staff's preliminary analysis, we concluded that the CUB proposal should be examined more throughly, and

[2] See, Leffler, Robert B. and Rogal, Martin H., *Consumer Participation in the Regulation of Public Utilities: A Model Act*, 13 Harvard Journal of Legislation (February 1976) at 237, in which the authors propose the CUB concept to provide "a vehicle to elicit widespread citizen participation in all government processes concerning utilities, and to provide the financial resources to render that participation effective."

[3] In its analysis, staff found that a well administered CUB might obtain the resources necessary to intervene effectively in the regulatory process; could provide information helpful to consumers; and could assist consumers with complaints. However, staff expressed concern about the need for additional ratepayer representation, given the existing activities of staff, the Consumer Protection Board and the Attorney General, and the possibility that CUB may become embroiled in partisan political activities, reducing its effectiveness.



instituted a proceeding to investigate the concept of a CUB and the feasibility of ratepayer access to the utilities' bill envelopes. To help focus the parties' comments, we issued proposed guidelines developed by staff with our commentary on the issues which we felt warranted particular attention. We sought comments on such issues as the need for such an organization; its purposes, structure, board selection process; and the access issue and encouraged parties to submit comments, recommend modifications, or propose different guidelines.

In response to our order, 64 parties submitted comments. Commentors included public officials, consumer groups, unions, utilities and individual consumers. (Appendix I contains a list of commentors.) In addition, over 220 letters on the CUB issue were received.

To further facilitate discussion on the issue of ratepayer access and CUB, we held nine Public Statement Hearings throughout the State.[4] One hundred seventy-five witnesses appeared and expressed their views. (Appendix II contains a list of the witnesses.) Moreover, a special Public Statement Hearing was held in Albany and participants from the utilities, consumer groups, and regulatory agencies from California and Wisconsin were invited.[5] The hearing provided an opportunity for us to discuss with these participants their experiences in implementing and working with a CUB.

In this opinion, we present an analysis of the comments and issues raised in this proceeding. We provide a review of the experiences of other states, and discuss the basis for our decision to grant access, by citizen ratepayer organizations, to the extra space in the utilities' bill envelopes.

[4] Public Statement Hearings were held in Rochester, Buffalo, Syracuse, Binghamton, Hempstead, New York City, Poughkeepsie, Albany and Utica.

[5] The experts who testified at the Albany Public Statement Hearing were: Ralph Nader, consumer advocate; Ness Flores, Chairman of the Wisconsin Public Service Commission; Leonard Grimes, President of the California Public Utilities Commission; Richard Abdoo, Vice President, Wisconsin Electric Power; Kathleen O'Reilly, Director of the Wisconsin CUB; Robert Fellmeth, California CUB organizer; Sylvia Siegel, Director of TURN; and John Phillips, California CUB organizer.

## II. OTHER STATES

### A. California

The California Public Utilities Commission (CPUC) is the only Commission in the country which has taken administrative action to facilitate the development of citizens ratepayer organizations by giving them access to the utility bill envelopes. In 1981, the CPUC ruled in a PG&E rate case in response to a petition of TURN, a consumer advocacy organization, that the extra space in PG&E's bill envelopes belonged to the ratepayers since the cost of the envelopes and postage was included in the utilities' revenue requriement. The CPUC defined "extra space" as the space remaining in the billing envelope after the inclusion of the monthly bill and any required legal notices up to a weight that does not require additional postage. The CPUC considered several possibilities for using this extra space and solicited proposals from interested parties.

In response to CPUC's solicitation, the Center for Public Interest Law proposed using the bill inserts of SDG&E to solicit funds to establish a voluntary, not-for-profit consumer organization, to be called the San Diego Utility Consumer Action Network (UCAN). UCAN's organizers modeled their organization on the CUB concept. As proposed, UCAN would intervene in SDG&E's cases only on behalf of residential or small business consumers, assist consumers with complaints, and provide informational services.

The CPUC granted UCAN access to SDG&E's excess space on a trial basis, four times a year for two years. In making this determination, the CPUC held that consumer participation in Commission proceedings is valuable because it ensures a full and complete record, and that UCAN would provide enhanced consumer participation without using tax dollars.[6] The CPUC also found the UCAN proposal desirable because it would benefit "the greatest number of ratepayers

[6] California does not have large scale participation in utility regulatory proceedings by state agencies. Testimony of President Grimes, Albany Public Statement Hearing (January 26, 1984) at 49.



and not just certain individuals or interest groups," through its low-cost membership ($4) and a democratic election of a board of directors.[7] Since distribution of its first bill insert in August 1983, UCAN has recruited approximately 60,000 members. It conducted its first election for a board of directors in March 1984.

In December 1983, the California Commission, in response to a petition, ordered PG&E to provide bill envelope access four times a year for two years to TURN. Unlike UCAN, TURN is an established organization which has been actively involved in PG&E's rate cases for the past 10 years. Its board is comprised of representatives of various consumer organizations in the state. In granting TURN access, the CPUC stated that TURN is a properly constituted not-for-profit corporation, has demonstrated an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population, and is unable to participate in all regulatory proceedings of PG&E without significant financial hardship.[8] PG&E has petitioned the CPUC for a rehearing in the case, and access has been stayed pending a decision.

The CPUC has also received petitions from TURN and a consortium of California Groups[9] asking for access to the Pacific Telephone and Telegraph (PT&T) billing envelope. The consortium's proposal is also modeled after the CUB concept.

### B. Wisconsin and Illinois

Wisconsin and Illinois have CUBs that were established by statute in 1979 and 1983, respectively. The Wisconsin CUB represents residential and farm utility consumers, while the Illinois CUB is limited to residential consumers. The statutes in both states provide for statewide CUBs with democratically elected boards of directors and access to the utilities' billing

[7] *Center for Public Interest Law v. SDG&E*, CPUC Case 82-03-05, (March 11, 1982) at 9.

[8] *TURN v. PG&E*, CPUC Case 83-05-13 (May 31, 1983) at 21.

[9] These groups are: the California Public Interest Research Group, Consumers Union, Common Cause of California, and Consumer Federation of America.

envelopes four times a year.[10] Neither Wisconsin[11] nor Illinois[12] have taxpayer funded agencies with rate case intervention activities of the same level as New York's CPB or Department of Law. (Appendix III provides a comparison of the Wisconsin and Illinois statutes, the California ruling in the SDG&E case, and the CUB legislation proposed by Governor Cuomo in New York.)

## III. ANALYSIS

The fundamental question to be addressed by this Commission is whether we should permit access to the utility billing envelopes by consumer groups. If we determine there is a need or benefit to be derived from such access, we must then decide the conditions under which such access is to be granted, and the purpose and structure of any organizations to be granted access. Since the focus of this record has been in the development of CUB-type organizations, these issues are analyzed in that context.

### A. Need

The threshold issue which has been the subject of extensive comment is whether there is a need for a CUB in this State in view of the existing intervention activities of Commission staff, the CPB, the Attorney General (AG), and a variety of consumer advocacy organizations.

The CPUC faced the issue of duplication of its own staff's efforts and found that "the participation by consumer groups tends to enhance the record in our proceedings and complement the efforts of our Commission staff."[13] Similarly,

[10] The Illinois CUB is still in its embryonic stage, although the interim board must hold its first election by December 1984. The Wisconsin CUB has enlisted approximately 90,000 members, out of 4 million eligible members each of whom pay a $3 membership fee.

[11] Testimony of Ness Flores, Chairman, Wisconsin Public Service Commission, PSC Public Statement Hearing (January 26, 1984) at 93.

[12] Illinois has a public advocate who occasionally represents individual consumers who have utility problems. Telephone interview with Ellen Craig, Special Assistant for Consumer Affairs to Gov. James R. Thompson, Illinois (February 8, 1984).

[13] *TURN v. PG&E, supra* at 22.



Chairman Flores of the Wisconsin Public Service Commission (WPSC), testified that CUB provides a worthwhile mechanism for grassroots intervention in the regulatory process.[14] CPUC's President and WPSC's Chairman stated that citizen organizations provided an additional perspective to their staffs', whose purpose was to represent a broader public interest.

CUB proponents, such as the CPB, New York Public Interest Research Group (NYPIRG), and the Public Utility Law Project (PULP), maintain that CUB will enable individual consumers to pool their resources to participate effectively in Commission proceedings and supplement existing intervention efforts. They contend that the budgets of existing consumer groups are insufficient to intervene consistently and that governmental advocates are often limited by institutional, fiscal or political constraints.[15] Ralph Nader points out that CUB offers consumers a non-governmental mechanism to "redress the imbalance of power between utilities and consumers" without imposing additional costs on those who wish not to participate.[16] Further, CUB supporters suggest that even if CUB has minimal impact on rates, "by giving consumers an official, privately controlled voice, their frustration can find constructive ventilation and articulation."[17]

Those who oppose granting access to a CUB-type organization, principally the utilities, the International Brotherhood of Electrical Workers (IBEW),[18] and the Business Council of New York State,[19] argue that CUB would serve only to duplicate the

[14] Chairman Flores commented that Wisconsin does not have an active governmental intervenor but that even if such an entity did exist, it would be a "proxy advocate" distinguishable from a CUB which is a citizens organization. Flores, *supra*, at 93.

[15] NYPIRG points out that five utilities in the State spent over $6 million on lobbying and intervention efforts.

[16] Testimony of Ralph Nader, PSC Public Statement Hearing, Albany (January 26, 1984) at 17.

[17] Testimony of Lt. Governor Del Bello, PSC Public Statement Hearing, New York City (January 17, 1984) at 12.

[18] The IBEW argues that if CUB is created, "at the very least there should be a substantial reduction in funding for or even an elimination of the CPB and AG's utility intervention unit." Written comments, December 12, 1983.

[19] Written comments of the Business Council of New York State, December 23, 1983, at 2.

representation already provided to ratepayers by the Commission's staff, the CPB, the AG and private groups, and would increase the cost of the regulatory process, which is borne by ratepayers. In addition, the utilities contend that CUB will be unable to affect utility rates because major components of a utility's bill such as inflation, interest rates, taxes, and fuel costs are largely beyond the utilities' control. Therefore, they argue that CUB will serve only to raise false expectations among consumers. IBEW further contends that residential ratepayers are already well represented, pointing out that they are subsidized by commercial and industrial ratepayers. It maintains that if residential ratepayers continue to receive preference, businesses and jobs will leave New York. The Business Council also believes that establishment of a CUB would send a negative signal to the State's businesses.

In examining the need issue, we have considered whether a CUB will offer consumers a meaningful way to voice their concerns in the regulatory process. In this proceeding, individuals and consumer groups have uniformly expressed both concern about the impact of utility rates on consumers and skepticism about the ratesetting process. Thus, we find that while existing groups may adequately represent consumer views,[20] CUB may offer consumers a way to become directly involved in regulatory issues and, as a result, help to increase their confidence in the regulatory process. Further, given the voluntary nature of a CUB, it may offer these potential benefits without imposing additional costs on taxpayers.

**B. Purpose**

Staff's proposed guidelines provided that the primary objective of a CUB would be to represent small business and residential consumers before regulatory agencies, assist in handling individual consumer complaints, and educate ratepayers about utility issues. We encouraged commentors to focus on whether CUB should represent small businesses as well as residential ratepayers and whether its activities should be limited to regulatory proceedings.

[20] In New York, unlike in Wisconsin, Illinois and California, government agencies regularly intervene in Commission proceedings.



**1. Constituency**

The scope of a CUB's constituency varies in each state. In California, UCAN proposed to represent residential and small business consumers. The CPUC accepted the proposal, leaving the definition of small business to the CUB board so long as it included businesses that could not be expected to represent themselves.[21] In the PG&E proceeding, the Commission allowed TURN to represent residential consumers. The Wisconsin law requires CUB to represent residential and farming consumers, while the Illinois statute mandates representation for residential consumers only. The Governor's Program Bill in New York similarly limited CUB representation to residential consumers.

Consumer groups generally contend that CUB should represent only residential consumers.[22] These groups maintain that such a limitation is necessary to avoid conflicts of policy and that, particularly in the area of rate design, the interests of residential and small business consumers conflict. Small business representatives appear to share this concern. Assemblyman Robin Schmminger, Chairman of the N.Y.S. Assembly Subcommittee on Small Business, supports the exclusion of small businesses stating that "these are two very divergent groups and a singular CUB may not be able to fully represent the interests of either."[23] And, subsequent to the initiation of this proceeding, Assemblywoman Mae Newburger, one of the primary sponsors of the original CUB legislation, introduced a bill[24] which would establish a CUB for small businesses in the State.[25]

[21] UCAN defined small businesses as those having less than 150 employees and an annual gross income of less than $2 million.

[22] See written comments of NYPIRG, CPB, PULP, N.Y.S. Assemblymembers Mae Newburger, Rhoda Jacobs and Ralph Goldstein.

[23] Written comments of N.Y.S. Assemblyman Robin Schimminger, Subcommittee on Small Business, dated December 14, 1983.

[24] New York State Assembly Bill 10102, by Newburger, *et al.* An Act Creating the Small Business Utility Board, Inc., March 6, 1984.

[25] On April 2, 1984, the Small Business Advisory Board of the N.Y.S. Department of Commerce in a letter to Secretary Kelliher recommended "that Small Business Utility Board(s) be authorized on a regional basis by utility service area."

While inclusion of small businesses in the CUB mandate has not been strongly advocated, the New York State Gas Group suggested that CUB should represent both classes of ratepayers, and the Owners' Committee on Electric Rates proposed that CUB be required to represent large commercial users as well, arguing that residential consumers should not receive preferential treatment.

In deciding this issue, we are concerned whether the views of small businesses are adequately represented in regulatory proceedings; nevertheless, we are also concerned whether the extension of membership to both residential and small business consumers may interfere with the organization's effectiveness. Given our intent that CUB should have the flexibility to establish its own program, we believe that the decision concerning small business representation should be left to CUB's organizers, as was done in California.[26]

**2. Consumer Complaints & Outreach Programs**

Our original order also invited discussion of whether CUB should be required to handle individual consumer complaints and provide educational information to ratepayers. While the CPUC stated that it did not know if the consumer complaint aspect is necessary, it found that CUB could best decide the issue based on its own experiences. Wisconsin and Illinois statutes do not require that the organizations resolve consumer complaints. In Wisconsin, however, assistance is provided to individuals with consumer complaints.[27] In each state, the CUB's functions include outreach.

Differing viewpoints were presented on whether the CUB should be directed to handle complaints. The Energy Association and NYPIRG both stated that individual complaint

[26] Proposals involving small business membership should contain a definition of small business which includes such businesses that do not have the resources to adequately represent themselves.

[27] At the Albany Public Statement Hearing, Kathleen O'Reilly, Director of the Wisconsin CUB, testified that handling utility complaints was beneficial in that it identified problem areas and provided individual assistance, and that outreach was a valuable CUB function. Ms. O'Reilly testified that CUB handled about 1,500 complaints in 1983, referring them either to the utility or the PSC staff. Testimony at Public Statement Hearing, Albany (January 26, 1984) at 146.



resolution was properly within the purview of a CUB, pointing out that it would enable CUB to assist its membership.[28] NYPIRG also stated that by handling complaints, CUB could identify problem areas. On the other hand, Assemblymembers Jacobs and Newburger, New York Telephone Company and the New York City's Department of Consumer Affairs, would not require CUB to handle consumer complaints. These parties cited the existence of Commission staff and contended that complaint handling would divert CUB's resources from its primary goal of intervention and advocacy.[29] In addition, a number of State agencies have energy related outreach programs. Given these existing programs, we have concluded that it is preferable to allow the organization to determine for itself whether complaint handling and consumer outreach are necessary to meet the needs of its members.

**3. Intervention and Lobbying**

In defining the scope of CUB's activities, the Commission requested that parties address the issue of whether CUB's purposes should be limited to regulatory intervention or should include lobbying as well. We expressed concern that lobbying may divert resources and interfere with effective intervention efforts. President Grimes testified that the California Commission has not confronted the lobbying issue in the UCAN or TURN cases.[30] In the Wisconsin and Illinois statutes and New York's Governor's Program Bill, lobbying is permitted.

Most consumer representatives strongly oppose restricting CUB's activities to regulatory matters.[31] They argue that lobbying is an important vehicle for affecting energy policy and

[28] The Energy Association stated that, "Assisting consumers with complaints might provide the greatest benefit of all. Were these activities not to be implemented CUB would quickly be viewed as simply a clever mechanism for raising funds." Written comments of the Energy Association, December 23, 1983, at 19. Written comments of NYPIRG, December 23, 1983, at 11.

[29] Assemblymember Jacobs pointed out that the Consumer Services Division of the Public Service Department handles complaints and is doing "an excellent job of educating consumers . . . [and that] CUB should advocate and intervene in rate cases." Written comments dated December 23, 1983, at 2.

[30] Testimony of President Grimes, *supra* at 64.

[31] Written comments of NYPIRG, NYS CPB, PULP, NYS Assemblymembers Newburger, Jacobs and Goldstein.

that CUB should have such powers in view of utility lobbying efforts. And the Center for the Study of Responsive Law pointed out that as a non-profit organization, CUB would be subject to federal and state lobbying restrictions and additional limitations were therefore unnecessary.[32] The Energy Association and New York Telephone Company support restrictions on lobbying activities. They contend that such activity would undermine the CUB's goal of being independent from political pressures.

Again, we believe that the CUB board should be responsible for developing the organization's programs and that the decision to participate in lobbying activities is best left to the CUB board, particularly in view of applicable expenditure limitations.

With respect to the organization's programs this proceeding has convinced us that CUB should determine the programs and priorities necessary to fulfill its purpose to be an independent consumer voice.[33] However, we are concerned that the membership be fully aware of the organization's priorities and that the organization has established standards against which its performance may be measured. Thus, we are requiring that the CUB board submit an annual plan setting forth the percentage of revenues projected to be spent on its intervention, lobbying, outreach and complaint and other programs.[34]

### C. Structure of the Organization

The issue which has been the subject of widespread commentary concerns the structure of the proposed organization.[35] The Commission in its order requested consideration of whether the organization should be organized on a Statewide,

[32] This organization submitted comments with New York Statewide Senior Action, the Environmental Planning Lobby, the Democracy Project, and the Telecommunications Research and Action Center.

[33] However, consistent with the legislation in Wisconsin and Illinois, the Governor's program bill and the CPUC decision, we will prohibit the organization from contributing to political campaigns.

[34] We express serious concern about using resources for purposes out-of-state other than lobbying and intervention activities.

[35] Staff's guidelines followed the statutes in Wisconsin, Illinois, California and the Governor's Program Bill, and provided that CUB shall be a not-for-profit organization. No commentor took issue with this position.



regional or utility-specific basis, and which structure would provide the most effective ratepayer representation.

The experience of other states is of interest. The Wisconsin and Illinois legislatures created single, statewide organizations. Kathleen O'Reilly, Executive Director of the Citizens Utility Board in Wisconsin, commented that, "Maximum effectiveness is achieved when a group has an overview of the entire state and all of the major utilities in order to maximally contribute to policy decisions."[36] In California, the Commission approved access to intervenor organizations on a utility-specific basis. President Grimes in his testimony contended that this method is preferable because it would be more likely to attract members by focusing on matters involving their utility.[37] However, President Grimes also stated that, "if a statewide group made the same application a local group did, we'd have to consider it on the same basis.[38] The Governor's Program Bill proposes a Statewide CUB.

Advocates of a statewide CUB maintain this type of structure would provide the strongest representation for consumers.[39] They point out that a statewide organization would be assured a larger population base from which to solicit members and funds, and would benefit economically from the use of a single central staff. Further, they contend that it would prevent confusion among utility ratepayers since there would be no overlapping of CUB jurisdictions. It would also prevent diffusion of resources by eliminating the need for consumers to join, and pay membership fees to, several CUBs in order to ensure their representation in telephone, electric, gas and water utility proceedings. Finally, they contend that a statewide CUB would provide a more integrated and comprehensive approach to utility energy policy.

[36] O'Reilly, *supra*, at 127.

[37] President Grimes also pointed out that the positive elements of a statewide CUB could be achieved through voluntary coordination among the utility groups, Albany Public Statement Hearing (January 26, 1984) at 57.

[38] Grimes, *supra*, at 63.

[39] The CPB, the N.Y.S. Secretary of State, the N.Y.S. Assembly, Ralph Nader, and consumer groups such as NYPIRG have all endorsed the concept of a statewide organization.

Two proposals have been offered as a means to structure a statewide CUB. A majority of those who support a single CUB endorse the structure described in the Governor's Program Bill. Under this plan, CUB board members would be elected from congressional districts, one member per two contiguous congressional districts. Supporters of this approach believe that congressional districts are the best geographical unit from which to elect a board because they are independently and equitably drawn, familiar to the voters, and updated every 10 years. To provide for more utility specific representation, however, Westchester Legal Services, Westchester County Legislator Paul Feiner, and Rochester Group 14621 would prefer electing board members on a utility franchise basis. Under this proposal, each utility franchise area would have a representative(s) on the statewide board.

Opponents of the single statewide CUB approach, such as Warren Anderson, President of the Senate, Assembly Minority Leader Clarence Rappleyea, Assemblyman Thomas Barraga, Manhattan Borough President Andrew Stein, The New York City Department of Consumer Affairs and the Niagara Frontier Consumer's Association believe that New York State's diversity in geography and population make a single statewide CUB unrealistic. They argue that it would be impractical for a statewide CUB to reach a consensus on issues such as the allocation of hydro power, and this may impede CUB's effectiveness. In addition, proponents of more than one CUB contend that fundraising may be easier since solicitation efforts would be targeted to the consumers served by a particular utility.[40] They do not believe, as statewide CUB advocates have suggested, that a CUB's activities would be fragmented; instead they believe that such a CUB would be more effective since its efforts would be directed toward one utility or region.

Supporters of multiple CUBs have made three proposals. Assembly Minority Leader Rappleyea, Assemblymen McCann and Miller, the Borough of Manhattan, and the New York Farm Bureau support regional CUBs that represent the service territories of New York's major power companies. Under the

[40] There may be some merit to this argument. UCAN has recruited over 60,000 CUB members in less than six months. The Statewide Wisconsin CUB has recruited 92,000 CUB members in three years.



Rappleyea plan, the regional CUBs would be serviced by a single, central staff.[41] New York Telephone and the New York Telephone Association, although opposed to CUB on legal and need grounds, support CUBs organized along industry lines. By organizing CUBs in this manner, they believe the organizations will develop the expertise necessary to understand issues relevant to the different utility industries. Finally, Assemblyman Goldstein has offered upstate/downstate CUBs as an alternative if the Commission chooses to have more than one CUB.

The arguments on both sides of this issue have merit. A reasonable approach to the competing concerns may be the development of a statewide organization which has a mechanism for ensuring regional representation. This structure would most likely be able to marshal the resources necessary to undertake effective representation of its members, allocate such resources in an efficient manner, and at the same time, ensure that local concerns are properly addressed. While a statewide structure may be preferable, in light of the serious questions which are posed by the granting of an exclusive privilege to any one private ratepayer organization, we will not preclude the submission of other applications (see later discussion).

### D. The Interim Board of Directors

#### 1. Selection

Since CUB would be a new organization with an elected board, it is necessary for an initial group to lay the groundwork to start up the organization. This interim board will play a significant role in shaping the direction of the organization. It will perform such important tasks as preparing the initial bill inserts and conducting the first election.[42] For this reason, the

[41] Assemblyman Rappleyea proposed that each regional CUB have the authority to intervene in telephone and water proceedings. Assemblyman Rappleyea also proposed a separate CUB for municipal electric companies and rural cooperatives, while the Borough of Manhattan proposed an additional CUB for New York Telephone. Written comments of Clarence Rappleyea, October 11, 1983, at 4. Written comments of the Borough of Manhattan, December 23, 1983, at 3.

[42] We consider that the interim board will be involved only in the initial organization activities, including membership solicitation and conduct of the first election. It will not engage in direct membership representation.

Commission sought comments on the selection method, the term of appointments and the function of such a group.

The method of selection in California differs from that in Wisconsin and Illinois. In Illinois and, as proposed in the Governor's Program Bill, the interim board is appointed by the Governor from lists submitted by legislative leaders. In Wisconsin, consent of the Senate was also required. In California, UCAN requested that the Commission appoint the interim board, but the CPUC refused. Regarding this refusal, President Grimes at the Albany hearing stated, "The Commission just feels. . . it would be. . . out of order. . . . I don't know how we can form them (CUB) and flatter them along, and on the other hand deal with them in rate cases.[43] UCAN's organizers appointed a "blue ribbon" board that included the Mayor of San Diego.

Consumer groups offer different proposals for selecting the interim board. Richard Kessel, head of the CPB, called for gubernatorial appointment of the board; the Borough of Manhattan recommended that the CPB appoint the board; the Center for the Study of Responsive Law called for Commission appointment; and NYPIRG suggested that a coalition of consumer groups constitute the interim board.

The issue of selection of the interim board presents competing considerations. To ensure the initial success of the organization, it is important that the board be composed of responsible and knowledgeable members. Thus, we could choose the members; however, as suggested by President Grimes, this may result in interference with the organization's independence. We could follow California's approach and allow CUB's proposers to choose the board. In this case, however, certain consumer interests may be underrepresented. Finally, we could suggest that appointments be made as provided in the Governor's bill. Government intervention in the appointment process may, however, detract from the organization's independence.

After weighing the arguments, we are convinced that the organizers should choose the board to ensure its independence

[43] Grimes, *supra* at 71.



from government intervention. We will require, however, that the board be representative of the consumer interest the organization purports to represent.

**2. Initial Funding**

Another issue associated with the organization's start-up is the need for an initial funding mechanism. Seed money was not provided to the Wisconsin CUB or proposed in the Governor's bill. In Illinois, the legislation provided for the Illinois Commerce Commission to lend the interim board funds for start-up activities which must be repaid within 24 months. A $100,000 interest-free loan was made to the newly appointed interim board. In California, UCAN took out a loan to fund its initial printing and administrative costs. Consumers Union, Syracuse's Urban Ministry Board, and Assemblyman Ralph Goldstein have proposed that the Commission or the CPB supply CUB with seed money. The California experience suggests that a CUB organization has the ability to obtain start-up funding without Commission or legislative intervention, and we see no need to address this issue.[44]

It has been widely suggested that once the interim board has been formed and has begun to solicit members and money, it attain some requisite membership and contribution levels before it calls for the election of the first board.

The Wisconsin statute required that the first election for the CUB board be held once CUB's membership reached 1,000 members, with at least 50 members in each district, and after CUB had solicited $10,000 in contributions. The Wisconsin CUB had five years to obtain these memberships and contribution levels. The CPUC gave UCAN one year to recruit the 3,500 members and $15,000 in contributions necessary to conduct the elections for the first board. The Illinois CUB has three years to enlist 10,000 members. The Governor's bill calls for the election of the first board once CUB membership reaches 25,000 with at least 100 members in each utility district.

[44] Over 60,000 customers joined UCAN after only two bill inserts. This contribution level provided UCAN with the resources to pay its initial debts in a timely manner.

Under the bill, the interim board would have up to two years to obtain the prescribed membership and contribution levels.[45]

With the exception of the utilities, the parties commenting on this question endorsed the minimum figures for members in the Governor's bill. Although there appears to be considerable support for these levels, we are concerned that they may be insufficient. For instance, assuming a $4 membership fee, if only the minimum number of members were recruited, CUB would have an operating budget of $100,000. According to Kathleen O'Reilly, the Wisconsin CUB has a budget of $600,000. New York's utilities provide service to almost four times as many customers as the companies in Wisconsin's. With this comparison in mind, a CUB which is able to recruit only the minimum number of members suggested by most parties may not have a solid financial base on which to operate. We have decided to allow the CUB organizers to recommend a minimum number of members, provided that they demonstrate that the organization will have sufficient resources to implement an effective program.

**3. Eligibility for Elected Board**

The final issue relating to the interim board is whether interim board members should be prohibited from seeking election to the first board. Comments on this question varied. The Wisconsin statute prohibited interim board appointees from competing in the first board election. Illinois and CPUC imposed no such restriction, nor did the legislation proposed by the Governor.

PULP and the Center for the Study of Responsive Law believe that interim board members should not be able to seek election to the first board in view of conflict of interest considerations. Assemblywoman Newburger and the Borough of Manhattan disagree and suggest that such a restriction may deter qualified individuals from serving on the interim board.

After consideration of these comments, we find that if interim board members were allowed to seek election to the

[45] For comparison purposes, Wisconsin's utilities provide service to approximately 4 million adult consumers. SDG&E provides service to approximately 1.5 million adult consumers. There are approximately 13 million adult utility consumers in New York State.



first board, the possibility exists that initial policies might be compromised by election considerations. To ensure against possible conflicts of interest, which may interfere with the organization's effectiveness, we have concluded that a limitation on interim board members running for the first board is warranted.

**E. Board of Directors**

In our draft quidelines, we made several proposals concerning CUB's board of directors that received extensive comment and which merit discussion.

Staff proposed to include *ex-officio* representatives on the CUB board to encourage better coordination with appropriate State agencies. Although the City of New York's Department of Consumer Affairs favored this idea, most parties who commented opposed the proposal,[46] stating that it may interfere with CUB's ability to set its own agenda.[47] While we find that such coordination may be beneficial, it is best left to the CUB board to determine whether *ex-officio* board members or some other method of coordination would be beneficial or interfere with its effectiveness as an independent consumer representative.

Staff also recommended that board members agree not to seek elective office for up to two years after their board term expires. The purpose of this restriction was to prevent the use of CUB board membership for personal or political gain at the expense of the organization's programs. Consumer groups universally objected to this proposal. Assemblywoman Newburger questioned its legality as well. While the concern which the restriction is designed to meet may be justified, a prohibition of this nature is too far reaching and should not be required.

[46] See written comments of NYPIRG; Assemblymembers Goldstein, Duane, Sanders, and Newburger; New York Telephone; and the New York Gas Group.

[47] As an alternative to *ex-officio* board representation, the Southern Tier Coalition for Lower Utility Bills and other have proposed a governmental liaison board to facilitate communication between CUB and other consumer advocacy agencies and groups.

In its written comments, PULP proposed that the CUB board include "representation of the special concerns of low-income residential utility consumers."[48] While PULP may have a legitimate concern, we question the prudence of singling out for special representation any one group, and the impact it may have on the election process. A more prudent approach, in our view, is to encourage CUB to implement programs to attract low-income members which we discuss later.

Another issue relating to the board involves eligibility of Commission staff and utility employees for membership on the CUB board. In *Wisconsin and Illinois,* people associated with the utility, elected officials and Commission staff are prohibited from seeking election to the board of directors.[49] The governor's bill also would prohibit such individuals from serving as CUB directors to minimize conflict of interest problems.

The IBEW strongly objects to the exclusion of utility employees as board members. They argue that prohibiting certain members of CUB from seeking election to the policy-making board is discriminatory, and may unduly restrict the members' options to determine who should direct their organization. Consistent with the concept of a CUB, we believe the membership should choose its board without external limitations on who is eligible to serve as long as the membership has full information about the candidates. Thus, we will refrain from excluding groups from board membership, but require full personal and financial disclosure statements from candidates and conflict of interest guidelines.[50]

### F. Bill Inserts

The scope of Commission review of the content of the bill inserts is an issue which was widely discussed. Under the proposed CUB guidelines, access would be in the form of bill

[48] Under the PULP proposal, CUB would establish special low-income membership criteria. CUB members who choose to join under this criteria would be entitled to vote for four statewide low-income board representatives.

[49] Each of these states provides that candidates to the board file personal and financial disclosure statements.

[50] We are concerned about unlimited campaign spending and we will require the applicant to specify reasonable limitations on campaign contributions and the amounts which can be expended on a given campaign.



enclosures, which may include a self-addressed envelope for membership contributions. The Commission would review the inserts to ensure compliance with Commission guidelines.

The Wisconsin law gives the Commission responsibility for reviewing the bill inserts. In this regard, Chairman Ness Flores of Wisconsin testified that he preferred not to be involved in such a review unless the information was clearly false or libelous. The California Commission also chose not to review UCAN's or TURN's enclosures.[51] Instead, the CPUC required UCAN and TURN to print a disclaimer[52] and ordered the utilities and the intervenor organizations to work out any difficulties through good faith negotiations.[53] However, the CPUC has stated that it would suspend the organization's access to the bill envelope if a serious problem developed. *In Illinois, the CUB must submit its* bill inserts to the *Illinois Commerce Commission* for approval. In New York, the Governor's bill does not provide for Commission review of the bill inserts. Insert disputes are to be resolved by the CUB and utility, if possible, or by a civil proceeding in circuit court.

The utilities contend that the Commission should review the bill inserts to ensure accuracy. NYPIRG also believes that the Commission should review the inserts to ensure that no information is "clearly false."[54] In addition, the Center for the Study of Responsive Law believes the Commission should review bill inserts for content, not style or tone, but only after a utility requests such a review. Those who oppose Commission review, including the CPB and Assemblywomen Newburger and Jacobs, contend that the Commission should not have the authority to censor CUB material.

[51] According to the CPUC President Grimes, "Our mandate is in the field of utility regulation, not in supervising the conduct of non-profit organizations who ultimately will be coming before us." Grimes, *supra* at 59.

[52] The disclaimer must clearly state that the intervenor organization is not associated with the CPUC.

[53] UCAN and SDG&E have established an arbitration board of six persons of which three were recommended by UCAN and three by SDG&E. When a dispute arises that UCAN and SDG&E cannot resolve, a member of the arbitration board, chosen by lot, will do so.

[54] NYPIRG, *supra*, at 22.

The views of both the California and Wisconsin Commissions are instructive. They argue that to preserve the independence of CUB, Commission interference with its activities should be kept to a minimum, particularly with respect to the content of its communications with its members. We agree and believe that it is incumbent upon the CUB to develop a dispute resolution mechanism designed to make Commission involvement in this process unnecessary. Nevertheless, the Commission is providing the organization with the special privilege of access and, as such, we recognize our responsibility to consider allegations that clearly misleading information is being included in the bill inserts.

**G. Membership Criteria**

The basis for membership in CUB varies with the different states. In California, small business and residential utility consumers must be at least 16 years old to join UCAN; in Wisconsin, members must be 18 years old; and in Illinois, the membership criteria will be established by the board of directors. Annual fees range from $3 to $5.

Most comments on this issue were general, simply stating that CUB members should be utility consumers, customers or ratepayers. The Center for Study of Responsive Law, however, proposed that membership not be limited to residential *ratepayers*, but should include any residential utility *consumer;* while NYPIRG and Assemblyman Goldstein proposed that CUB members be 18 years old.

We believe that CUB should establish membership criteria that are reasonable given the voting responsibilities involved in membership. Further, to ensure broad representation, we find that membership should be available to utility consumers as well as ratepayers.

In a related matter, the Legal Aid Society suggested that the membership fee structure be such that the poor are not excluded from participation. Rather than imposing any specific requirements in this regard, we will ask the organizers to address the issue of ensuring participation of low income consumers.



Finally, with respect to funding the organization, we are concerned that the organization be truly representative of its membership and, consistent with Illinois and Wisconsin legislation, we will require criteria which place reasonable limitations on funding from sources other than membership fees.

**H. Affected Utilities**

In defining which utilities should be affected by the activities of the Citizens Utility Board, two questions emerged: (a) Should an organization have access to all utility envelopes regardless of size and revenue, including water companies?, and (b) Should the scope of intervention activities be limited to those utilities that must provide access to their envelopes? Staff proposed that the CUB have the authority to use the bill envelopes of gas, electric or telephone utilities having annual operating revenues of more than $100 million. These include the nine major gas and electric companies, as well as the three largest telephone companies—New York Telephone, Rochester Telephone and Continental Telephone.

The Wisconsin law gave the CUB access to the envelopes of utilities with annual revenues of more than $2.5 million for gas, electric and water, and $1.6 million for telephone. In Illinois, CUB had access to envelopes of all utilities except those municipally owned. The California Commission has handled the question on a case-by-case basis, and the Governor's program bill provided access to all utility envelopes.

Comments received from the parties vary. New York Telephone Company, The Legal Aid Society, the Center for Study of Responsive Law and N.Y.S. Assemblywomen Newburger and Jacobs favored giving access to envelopes of all utilities regulated by the Public Service Commission, claiming that the issues that affect utility consumers are the same regardless of the regulated utility's operating revenue. The Energy Association favored extending access to municipal electric utilities, and the City of New York and CPB would limit access to utilities with annual operating revenues of $50 million and $20 million respectively.[55] Assemblyman Goldstein pro-

[55] None of the comments addressed the fact that the PSC regulates over 450 utility companies, many of them small water companies—several have less than 10 customers. Comments in favor of extending access to water companies failed to provide a compelling reason for the Commission to do so at this time.

posed retaining the $100 million revenue threshold before requiring access.

We note that by limiting access to those utilities with annual revenues of $100 million or more, virtually all utility consumers will be reached by CUB's insert, either through their gas, electric or telephone bill. In fact, some consumers in western New York and New York City may get three inserts in three separate bills. Furthermore, imposing a limitation on the utilities which must provide access need not necessarily imply a limitation on intervention by, or other activities of, CUB. In fact, we recognize that many of the issues decided in proceedings of smaller utilities affect the industry as a whole; therefore, intervention should not be limited to those companies required to give access to billing envelopes. Rather, the priorities—with respect to which matters the organization gets involved in—may best be left to the board and its perception of the needs of the organization's membership. Thus, we believe a limitation to companies with $100 million in revenues is reasonable but leave it to the CUB to determine which cases it should pursue.

**I. Access**

Together with the issues associated with bill insert content and the existence of extra space in the billing envelope is the issue of the extent to which access should be given. The Commission order sought comments on how many times a year access should be given.

The Wisconsin Legislature initially granted CUB access to the utilities' bill envelopes four times over a 48-month period. A 1983 amendment to the CUB legislation modified the CUB's access rights to four times a year and removed the 48-month access termination provision. In California, the CPUC has granted UCAN access four times a year for two years after which it will review its performance to determine if access should continue. The Illinois Legislature gave the CUB access four times a year, which was proposed as well in New York's Governor's program legislation.

New York Telephone, in its comments on staff's guidelines, proposed that access be given two times a year with biennial review. NYPIRG, Westchester Legal Services and Assemblyman Goldstein sought that access be granted four times a year. Edward J. Rutkowski, County Executive for Erie County, proposed: "CUBs should be allowed the widest possible access... at minimum, twice a year."[56]



In deciding how often the CUB should have access, we have considered what frequency is sufficient to enable CUB to communicate effectively with its members. Also, access criteria should be developed in view of the utilities' regularly scheduled billing cycles to avoid unnecessary administrative costs. In view of the constraints of bimonthly billing in this State, a proposed schedule which may be workable and which may provide sufficient means to communicate is access to every third bill mailing. Nevertheless, we seek CUB proposals on this access issue in view of our concerns. Further, we believe that access should be limited to two years after the election of the first board, pending our review; the review would be based on the criteria which CUB determines is appropriate in its initial application.

**J. Open Records and Independent Audit**

Although the Commission order requested comments on the nature and extent of independent audit and oversight of the CUB, few individuals or organizations gave specific comments and recommendations on this aspect of the CUB.

The Center for the Study of Responsive Law, the CPB and the Energy Association stated that safeguards should be in place to secure membership control and oversight of CUB. These safeguards should include mandatory regular open meetings of the board of directors, filing of annual reports, and allowances for recall elections of members of the board. The CPB and the Energy Association concurred with the recommendation that an independent audit of CUB should be required on a regular basis.

Because a crucial characteristic of the CUB is its accountability to its members, we will require open meeting procedures, an annual independent audit and a semi-annual report of its activities to the Commission.

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[56] Written comments of Erie County Executive Edward J. Rutkowski, December 22, 1983, at 2.

## K. Exclusive Access

During this proceeding, the issue has emerged of whether a single ratepayer organization should be granted exclusive access. In Wisconsin and Illinois, a not-for-profit Statewide membership organization to represent the interest of utility consumers was created by statute. Similar legislation has been proposed in New York. In California, however, the only state which has acted without the benefit of legislation, the Commission declined to limit access to one organization and instead has invited proposals from various consumer organizations. Access has been granted to UCAN, a CUB-type organization, in the SDG&E service territory and TURN, an experienced consumer organization, in the PG&E service territory.[57] President Grimes testified in relation to the reasons for the Commission's approach: "I believe that a policy of minimum intervention is a proper one. Not only does it preserve the independence of the ratepayer organization, but it recognizes the Commission's limited ability and lack of desire in our case to regulate the affairs of such organization."[58]

Concerns have been voiced in this proceeding that without an exclusive right of access, resources may be diffused, leading to ineffective representation. Sylvia Siegel, however, who as director of TURN has extensive experience as a consumer advocate in California's regulatory process, argues that there "should be different models in a diverse state to represent diverse interests effectively,"[59] and that an opportunity to obtain increased funding for their valuable efforts should be provided. She expressed her point of view as follows: "I think the fact that you have other consumer groups who have

[57] Both TURN and a group proposing the development of a CUB-type organization are now seeking access to the Pacific Telephone Company's bill envelopes.

[58] President Grimes' testimony, Albany Public Statement Hearing at 59. President Grimes also pointed out that "Our decisions by themselves do not assure effective rate-payer participation. What they create is unique opportunities for ratepayer advocates to communicate with the ratepaying public and seek financial support for their efforts. Whether sweet success or bitter failure flows from this opportunity will depend largely on the skills, talents and political sensitivity of consumer leaders." Testimony at 62.

[59] Testimony of Sylvia Siegel, Albany Public Statement Hearing at 158.



participated in a meaningful way is important and my urging would be to beef up their resources."[60]

We have also examined the issue of exclusivity in a legal context. The Commission does have broad regulatory authority over the utility operations, but unlike the legislature, it has no power to create a private corporation or to define such a corporation's powers, functions and duties. Moreover, the granting of access to one private ratepayer organization raises serious questions of discrimination under the Public Service Law. It should be noted that one of the Commission's fundamental responsibilities is to avoid and prevent discrimination in favor of or against any individual or group of ratepayers. Thus, while we believe that we have the authority to direct utilities to open their billing envelopes to organizational and fund raising messages necessary to develop non-governmental ratepayer representation, we also find that granting an exclusive right of access to a single organization presents serious legal concerns.

Furthermore, aside from our legal concerns, we are not convinced that offering the important and valuable privilege of access to more than one private ratepayer organization will diminish the effectiveness of such organizations. First, we are not convinced, on the basis of the record before us, that duplication and diffusion of resources will occur. Second, we find California's analysis of this issue persuasive. Further, California's experience thus far suggests that its approach is a valid one. While a single Statewide organization may be preferable and we are prepared to grant access to an acceptable Statewide proposal, we do not believe that we are justified, either on legal or policy grounds, in granting a single ratepayer organization an exclusive right to access. We will, however, reserve the right to coordinate or limit access, should applications by multiple organizations, in fact, prove to be a problem.

[60] Testimony of Sylvia Siegel at 159.

## IV. CONCLUSION

Significant public interest has been focused on our proceeding to examine the issue of ratepayer access to the utility bill envelope. Over the past years, support has emerged for the creation of a Citizens' Utility Board in this State. Proposals to create such an organization have been pending in the legislature and the Governor has included a CUB proposal in his legislative program. Further, in October of last year, the Governor asked this Commission to consider possible administrative action to facilitate the development of a Citizens' Utility Board in this State.

In response, we initiated a proceeding to examine the issue of ratepayer access and the concept of a Citizens' Utility Board. The proceeding provided a valuable opportunity to examine the difficult and controversial issues involved with ratepayer access to utility bill envelopes.

We have conducted a thorough review of the record and based on our analysis, have concluded that providing ratepayer access to the bill envelope to facilitate increased utility consumer representation is in the public interest. Further, we find that the Commission has the legal authority to require utilities to open their billing envelopes for this purpose. Thus, we will direct the appropriate utilities to open their billing envelopes to enable a qualifying organization to communicate with consumers and solicit membership and funds.

Finally, we expect to receive an application for a Statewide organization in the near future and it is clear from our opinion that a proposal for a Statewide organization, consistent with our general standards, will be granted access to the utility bill envelopes. For the reasons previously discussed, however, we will not grant an exclusive privilege of access. However, we are very much aware of the concerns that have been expressed with respect to the provision of access to more than one group. We will be monitoring developments in this regard closely and reserve the right to coordinate or limit access if necessary to ensure effective representation of this State's utility consumers.



## STATE OF NEW YORK
## PUBLIC SERVICE COMMISSION

CASE 28655—Proceeding on Motion of the Commission to Examine Ratepayer Access to Utility Billing Envelopes and the Concept of a Citizen's Utility Board

Separate Statement of Commissioners Anne F. Mead and Rosemary Pooler:

We agree with the major thrust of the majority Statement of Policy in this proceeding. However, we disagree with several of the findings of the majority as follows:

*Board of Directors*—We disagree with the majority finding that the "membership should choose its board without external limitations on who is eligible to serve as long as the membership has full information about the candidates." We believe that there should be external limitations which would exclude employees, directors and consultants of a public utility doing business in New York State, employees of the Department of Public Service and Power Authority of New York, and elected officials or persons seeking elective office. We believe that such limitations are essential to avoid serious conflict of interest problems and to assure the creation of a citizen controlled Board of Directors.

*Bill Inserts*—We would limit Commission responsibility to consideration of allegations that clearly false information has been included in the bill insert. The majority would consider "clearly misleading information." This standard invites a plethora of allegations based on subjective opinions as to what is or is not misleading.

*Exclusive Access*—The primary issue raised in this proceeding is whether to grant exclusive access to a statewide CUB or provide equal access to organizations who meet our guidelines. Although the majority states a preference for a single statewide organization, and are prepared to grant access to an acceptable statewide propo-

sal, they believe that on both legal and policy grounds they are unable to grant exclusive right to access to a single statewide CUB.

We believe there are compelling policy grounds for granting exclusive access.

First, residential consumers as a class have very similar problems. While there may be regional differences, case and issue priorities will have to be determined, regardless of the geographical area of the organization. However, most issues can be agreed upon in a democratically operated organization with effective regional representation.

Secondly, it seems to us that PULP was correct when it stated, "it is not practical to establish CUB on regional or on service territory lines. New York Telephone Company is the dominant exchange service telephone utility. Brooklyn Union Gas and National Fuel Gas are major natural gas utilities whose service territories are different than that of electric utilities that provide service to the same customers. Any regional or utility plan would thus cause inefficient overlapping in several cases by various CUBs and would virtually assure that certain CUBs could not accumulate the resources to hire a quality staff. A regional or utility approach would also create inefficiencies in assuring effective representation in generic proceedings at the Commission. A recent example is the Commission's consideration of marginal cost issues in Phase II of Consolidated Edison, Case #27353. This extended proceeding was conducted in New York City but had implications for customers of each electric utility. Surely it is apparent that only a statewide entity would be appropriate and economically feasible for representing the interests of residential customers."

With respect to the legal issues raised regarding exclusive access, we think the fact that all ratepayers will have equal access to the billing mechanism via a single statewide CUB and through a democratic election process to the Board of Directors, should ease the concern regarding the proscriptions against undue preferences in sections 65(3) and 91(3) of the Public Service Law. In addition, it appears from the legal arguments



raised to date, that First Amendment and Equal Protection issues will not be violated by exclusive access to the billing envelope.

Given the compelling policy reasons for granting exclusive access to a single statewide CUB and the legal arguments presented by the various parties, we would grant exclusive access to an acceptable statewide organization.

Furthermore, the majority has not explained how it would "coordinate or limit access, should applications by multiple organizations, in fact, prove to be a problem." We believe the practical and efficient course of action is exclusive access on a statewide basis.

## APPENDIX J

## CREATES CITIZENS' UTILITY BOARD TO REPRESENT INTERESTS OF UTILITY CONSUMERS

**QUESTION:** Should a nonprofit public corporation funded by voluntary contributions be established to represent the interests of utility consumers?

**EXPLANATION:** Creates Citizens' Utility Board to represent interests of electric, telephone, gas and heating utility consumers before legislative, administrative and judicial bodies, conduct research and investigations. Authorizes Oregon residents contributing $5 minimum to board to vote for members of board. Establishes eligibility requirements and limits contributions and expenditures for board candidates. Authorizes board periodically to include certain materials with utility billings, subject to limited cost reimbursement to utility. Exempts municipallties, cooperatives and people's utility districts.

### AN ACT

**Relating to public utilities.**

***Be It Enacted by the People of the State of Oregon:***

SECTION 1. The people of the State of Oregon hereby find that utility consumers need an effective advocate to assure that public policies affecting the quality and price of utility services reflect their needs and interests, that utility consumers have the right to form an organization which will represent their interests before legislative, administrative and judicial bodies, and that utility consumers need a convenient manner of contributing to the funding of such an organization so that it can advocate forcefully and vigorously on their behalf concerning all matters of public policy affecting their health, welfare and economic well-being.

SECTION 2. As used in this Act, except as otherwise specifically provided or unless the context requires otherwise:

(1) "Board" means the Citizens' Utility Board of Governors.



(2) "Consumer" or "utility consumer" means any natural person 18 years of age or older who is a resident of the State of Oregon.

(3) "District" means an electoral district for members of the Citizens' Utility Board of Governors.

(4) "Member" means a member of the Citizens' Utility Board.

(5) "Utility" means any utility regulated by the Public Utility Commissioner pursuant to ORS chapter 757, which furnishes electric, telephone, gas or heating service. However, "utility" does not include any municipality, cooperative, or people's utility district.

SECTION 3. (1) The Citizens' Utility Board is hereby created as an independent nonprofit public corporation and is authorized to carry out the provisions of this Act.

(2) The Citizens' Utility Board has perpetual succession and it may sue and be sued, and may in its own name purchase and dispose of any interest in real and personal property, and shall have such other powers as are granted to corporations by ORS 61.061. No part of its net earnings shall inure to the benefit of any individual or member of the Citizens' Utility Board.

(3) The Citizens' Utility Board shall have all rights and powers necessary to represent and protect the interests of utility consumers, including but not limited to the following powers:

(a) To conduct, fund or contract for research, studies, plans, investigations, demonstration projects and surveys.

(b) To represent the interests of utility consumers before legislative, administrative and judicial bodies.

(c) To accept grants, contributions and appropriations from any source, and to contract for services.

(d) To adopt and modify bylaws governing the activities of the Citizens' Utility Board.

SECTION 4. The Citizens' Utility Board of Governors shall manage the affairs of the Citizens' Utility Board. The board

may delegate to an executive committee composed of not fewer than five members of the board the authority as would be allowed by ORS 61.141.

SECTION 5. (1) Within 90 days after the effective date of this Act an interim board of directors shall be appointed by the Governor, subject to confirmation by the Senate in the manner prescribed in ORS 171.562 and 171.565. One director shall be appointed by the Governor, two directors each shall be appointed by the Governor from each list of not more than five names per director position submitted individually by the President of the Senate and the Speaker of the House of Representatives; one director each shall be appointed from each list of not more than five names submitted individually by the majority leader of the Senate and the majority leader of the House and by the minority leader of the Senate and the minority leader of the House.

(2) No person who is a director, employee or agent of any public utility is eligible to be a director appointed under this section. While on the Board, no interim director appointed under this section may hold elective public office, be a candidate for any elective public office or be a state public official. No interim director may be a candidate in the first election under section 6 of this Act. No person who owns or controls, either singly or in combination with any immediate family member, utility stocks or bonds of a total value in excess of $3,000 is eligible to serve as an appointed member of the Citizens' Utility Board of Governors.

(3) Within 120 days after the Citizens' Utility Board has obtained 5,000 members, with a minimum of 100 members in each district, an election shall be held pursuant to section 6 of this Act for selection of the Citizens' Utility Board of Governors.

(4) The board of directors appointed under subsection (1) of this section shall prescribe the procedure for election conducted by mail ballot for the first Citizens' Utility Board of Governors, and shall establish bylaws regarding campaign contributions and expenditures for election to the Citizens' Utility Board of Governors. In no case shall such contributions or expenditures exceed $1,000 and in no case can a candidate



accept more than $250 in campaign contributions from any one contributor. In addition, no candidate shall accept campaign contributions from a utility, municipality, cooperative, or people's utility district.

SECTION 6. (1) The Citizens' Utility Board of Governors shall be comprised of three persons elected from each congressional district described in ORS 188.130 by a majority of the votes cast by members residing in that district. The election shall be conducted by mail ballot in such manner as the Citizens' Utility Board of Governors may prescribe.

(2) The term of office of a member of the Citizens' Utility Board of Governors is four years. No person may serve more than two consecutive terms on the Citizens' Utility Board of Governors.

(3) Each candidate and each member of the Citizens' Utility Board of Governors must be a member of the Citizens' Utility Board and must be a resident of the district from which the candidate seeks to be or is elected.

(4) At least 45 days before an election each candidate shall file with the Citizens' Utility Board of Governors a statement of financial interests, which shall contain the information in such form as the Citizens' Utility Board of Governors shall determine. Each candidate shall maintain a complete record of contributions received and expenditures made with regard to an election campaign. Each candidate shall make the records available for public inspection at such reasonable times as the Citizens' Utility Board of Governors considers appropriate.

(5) No member who is employed by a utility shall be eligible for appointment or election to the Citizens' Utility Board of Governors, and no member of the Citizens' Utility Board of Governors who obtains employment by a utility may maintain a position on the Citizens' Utility Board of Governors. While on the Board, no director elected under this section may hold elective public office, be a candidate for any elective public office, or be a state public official. No person who owns or controls, either singly or in combination with any immediate family member, utility stocks or bonds of a total value in excess

of $3,000 is eligible to serve as an elected member of the Citizens' Utility Board of Governors.

(6) The Citizens' Utility Board of Governors may disqualify any candidate or member of the Citizens' Utility Board of Governors for any violation of this Act or of the bylaws of the Citizens' Utility Board.

(7) Upon petition signed by 20 percent of the members in a district for the recall of a member of the Citizens' Utility Board of Governors elected from the district, the Citizens' Utility Board of Governors shall mail ballots to each member in the district, submitting the question whether the member of the Citizens' Utility Board of Governors shall be recalled. If a majority of the members voting at the election vote in favor of the recall, then the member of the Citizens' Utility Board of Governors shall be recalled. Elections and recall proceedings shall be conducted in a manner as the Citizens' Utility Board of Governors may prescribe. Ballots for all election and recall proceedings shall be counted at a regular meeting of the Citizens' Utility Board of Governors.

(8) The remaining members of the Citizens' Utility Board of Governors shall have the power to fill vacancies on the Citizens' Utility Board of Governors.

SECTION 7. (1) Notwithstanding the term of office specified by subsection (2) of section 6 of this Act for members of the Citizens' Utility Board of Governors, of the members first elected from each district:

(a) One shall serve for a four-year term.

(b) One shall serve for a three-year term.

(c) One shall serve for a two-year term.

(2) For the purpose of determining the length of a term of a member pursuant to subsection (1) of this section, the length of the term of each member from a district shall be based upon the number of votes received by the member, with the member who receives the most votes in each district serving for the longest term and the member who receives the fewest votes serving for the shortest term.



SECTION 8. All meetings of the board shall be open to the public, except under the same circumstances in which a public agency would be allowed to hold executive meetings under ORS 192.660.

SECTION 9. *(1)* All consumers are eligible for membership in the Citizens' Utility Board. A consumer shall become a member of the Citizens' Utility Board upon contribution of at least $5 but not more than $100 per year to the Citizens' Utility Board. Each member shall be entitled to cast one vote for the election of the board. The board shall establish a method whereby economically disadvantaged individuals may become members of the Citizens' Utility Board without full payment of the yearly contribution.

*(2)* Each year the Citizens' Utility Board shall cause to be prepared, by a certified public accountant authorized to do business in this state, an audit of its financial affairs. The audit is a public record subject to inspection in the manner provided in ORS 192.410 to 192.500.

SECTION 10. *(1)* Upon request by the Citizens' Utility Board pursuant to this section, each utility shall include in billings to a utility consumer materials prepared and furnished by the Citizens' Utility Board, not exceeding in folded size the dimensions of the envelope customarily used by such utility to send billings to its customers.

*(2)* The Citizens' Utility Board shall not intentionally make any false material statement in any material submitted to a utility for inclusion with a billing. If the utility believes that the Citizen's Utility Board has intentionally made false material statements in an enclosure, it may file a complaint with the Public Utility Commissioner of Oregon within five days of receipt. The Public Utility Commissioner of Oregon must review the complaint within ten days, and if the Commissioner determines that the Citizens' Utility Board has intentionally made false material statements, the commissioner shall give the Citizens' Utility Board of Governors written notification that specifies any false material statements made and the reasons why the Commissioner determines the statements to be false.

*(3)* No utility shall be required to enclose Citizens' Utility Board material with a billing more than six times in any calendar year.

*(4)* The Citizens' Utility Board shall notify a utility of its intention to include under the provisions of this Act any material in any specified periodic billing or billings not fewer than 30 calendar days prior to the mailing of the periodic billings and shall supply the utility with the material not fewer than 20 calendar days prior to the mailing of the periodic billings.

*(5)* All material submitted by the Citizens' Utility Board for inclusion in a utility billing must include the return address of the Citizens' Utility Board. A utility is not required to deliver or forward to the Citizens Utility Board material intended for the Citizens' Utility Board mistakenly sent to the utility. However, a utility shall retain such materials for a period of 60 days from the date of receipt. The utility shall notify the Citizens' Utility Board that such materials have been received and make these materials available to the Citizens' Utility Board on demand.

SECTION 11. *(1)* The Citizens' Utility Board shall not be required to pay any postage charges for materials submitted by the Citizens' Utility Board for inclusion in a utility billing if such materials weigh four-tenths of one ounce avoirdupois or less. If the materials submitted weigh over four-tenths of one ounce avoirdupois, then the Citizens Utility Board shall reimburse the utility for a portion of the postage costs which is equal to that portion of the Citizens' Utility Board material over four-tenths of one ounce avoirdupois in proportion to the total weight of the billing. In addition to postage costs, the Citizens' Utility Board shall reimburse such other reasonable costs, as determined by the Public Utility Commissioner of Oregon, incurred by a utility in complying with section 10 of this Act.

*(2)* Reimbursement of a utility by the Citizens' Utility Board shall be made within 60 days of the date the utility submits to the Citizens' Utility Board an itemized statement of the costs incurred by the utility. In no event shall such reimbursement exceed the fair market value for the services provided by the utility.



SECTION 12. *(1)* No utility, nor any of its employes, officers, members of the board of directors, agents, contractors or assignees, shall in any manner interfere with, delay, alter or otherwise discourage the distribution of any material or statement authorized by the provisions of this Act for inclusion in periodic utility billings, nor in any manner interfere with, hamper, hinder or otherwise infringe upon a utility consumer's right to contribute to Citizens' Utility Board, nor in any manner hamper, hinder, harass, penalize or retaliate against any utility consumer because of the consumer's contribution to, or participation in, any activities of the Citizens' Utility Board.

*(2)* No utility may change its mailing, accounting, or billing procedures if such change will hamper, hinder, or otherwise interfere with the ability of the Citizens' Utility Board to distribute materials or statements authorized by this Act.

SECTION 13. Citizens' Utility Board may submit to the appropriate agency any complaint it receives regarding a utility company. Public agencies shall periodically inform Citizens' Utility Board of any action taken on complaints received pursuant to this section.

SECTION 14. Notwithstanding any other provision of law:

*(1)* Whenever the board determines that any agency proceeding may affect the interests of utility consumers, Citizens' Utility Board may intervene as of right as an interested party or otherwise participate in the proceeding.

*(2)* Citizens' Utility Board shall have standing to obtain judicial or administrative review of any agency action, and may intervene as of right as a party or otherwise participate in any proceeding which involves the review or enforcement of any action by an agency, if the board determines that the action may affect the interests of utility consumers.

SECTION 15. *(1)* ORS chapters 278, 279, 282, 283, 291, 292, 293, 295 and 297 do not apply to Citizens' Utility Board or to the administration and enforcement of this Act. An employe of Citizens' Utility Board shall not be considered an "employe" as the term is defined in the public employes' retirement laws.

Citizens' Utility Board and its employes shall be exempt from the provisions of the State Personnel Relations Law.

*(2)* ORS 183.310 to 183.550 does not apply to determinations and actions by the board.

*(3)* The board, and any of the officers, employes, agents or members of Citizens' Utility Board shall be provided the same protections from liability as the board, officers, employes, agents, or members of any non-profit corporation of the State of Oregon.

SECTION 16. *(1)* Any utility, and any of its employes, officers, members of the board of directors, agents, contractors or assignees which does, or causes or permits to be done, any matter, act or other thing prohibited by this Act, or omits to do any act, matter or other thing required to be done by this Act, is liable for any injury to Citizens' Utility Board and to any other person in the amount of damages sustained in consequence of such violation, together with reasonable attorney fees, to be fixed by the court in every case of recovery. Such attorney fees shall be taxed and collected as part of the costs in the case.

*(2)* Citizens' Utility Board may obtain equitable relief, without bond, to enjoin any violation of this Act.

*(3)* Any recovery or enforcement obtained under this section shall be in addition to any other recovery or enforcement under this section or under any statute or common law. Any recovery under this section shall be in addition to recovery by the state of the penalty or fine prescribed for such violation by this Act. The rights and remedies provided by this Act shall be in addition to all other rights and remedies available under law.

SECTION 17. Willful violation of section 10, parts (1) or (5) or section 12 of this Act is a Class A misdemeanor.

SECTION 18. If any section, portion, clause or phrase of this act is for any reason held to be invalid or unconstitutional the remaining sections, portions, clauses and phrases shall not be affected but shall remain in full force or effect, and to this end the provisions of this Act are severable.



**APPENDIX K**

## PUBLIC UTILITIES—INTERVENOR'S FEES AND EXPENSES—RATESETTING

**Senate Bill No. 4**

CHAPTER 297

An act to add Article 5 (commencing with Section 1801) to Chapter 9 of Part 1 of Division 1 of the Public Utilities Code, relating to public utilities.

**[Approved by Governor July 5, 1984. Filed with Secretary of State July 6, 1984]**

### LEGISLATIVE COUNSEL'S DIGEST

SB 4, Montoya. Public utilities: intervenors.

Under existing law, the jurisdiction and control over public utilities, including electrical, gas, telephone, telegraph, and water corporations, is vested in the Public Utilities Commission, including the power to fix rates and charges and to specify the terms and conditions under which service is furnished.

This bill would state the intent of the Legislature to confirm the authority of the commission to make awards to participants in proceedings of the commission commenced on or before December 31, 1984, pursuant to the commission's rules and regulations, and to require that awards in proceedings commenced on and after January 1, 1985, be governed by this bill.

The bill would authorize the commission to award reasonable advocate's fees, expert witness fees, and other costs of participation or intervention in any hearing or proceeding for the purpose of modifying a rate or establishing a fact or rule that may influence a rate to any customer of an electrical, gas, telephone, telegraph, or water corporation meeting the bill's requirements regarding substantial contribution to the proceeding and financial hardship as a result of participation. The bill would specify how the customer is to make application for an

award and the basis for the commission's determination of the customer's eligibility therefor. The bill would authorize the commission to designate a common legal representative in cases where it finds it appropriate to do so. The bill would direct that any award of compensation ordered by the commission shall be paid by the public utility which is the subject of the hearing or proceeding, and would authorize the public utility to recover through its rates the amount of the award so ordered within one year of the date of the award.

*The people of the State of California do enact as follows:*

SECTION 1. It is the intent of the Legislature in enacting this act to confirm the authority of the Public Utilities Commission in proceedings commenced on or prior to December 31, 1984, to make awards to participants pursuant to existing rules and regulations of the commission and to require that for proceedings commenced on and after January 1, 1985, awards to customers shall be made pursuant to this act.

SECTION 2. Article 5 (commencing with Section 1801) is added to Chapter 9 of Part 1 of Division 1 of the Public Utilities Code, to read:

**Article 5. Intervenor's Fees and Expenses**

1801. The purpose of this article is to provide compensation for reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any hearing or proceeding of the commission for the purpose of modifying a rate or establishing a fact or rule that may influence a rate.

1802. As used in this article:

(a) "Compensation" means payment for all or part, as determined by the commission, of reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of participation or intervention in a hearing or proceeding for the purpose of modifying a rate or establishing a fact or rule that may influence a rate, and includes the fees and costs of obtaining judicial review, if any.



(b) "Expert witness fees" means recorded or billed costs incurred by a customer for an expert witness.

(c) "Other reasonable costs" means reasonable out-of-pocket expenses incurred by a customer not exceeding 25 percent of the total or reasonable advocate's fees and expert witness fees awarded.

(d) "Party" means any interested party, respondent public utility, or commission staff in a hearing or proceeding for the purpose of modifying a rate or establishing a fact or rule that may influence a rate.

(e) "Customer" means any participant representing consumers, customers, or subscribers of any electrical, gas, telephone, telegraph, or water corporation subject to the jurisdiction of the commission; any representative who has been authorized by a customer; or any representative of a group or organization authorized pursuant to its articles of incorporation or bylaws to represent the interests of residential customers, but does not include any state, federal, or local government agency, any publicly owned public utility, or any entity which in the commission's opinion was established or formed by a local government entity for the purpose of participating in a commission proceeding.

(f) "Significant financial hardship" means both of the following:

(1) That, in the judgment of the commission, the customer has or represents an interest not otherwise adequately represented, representation of which is necessary for a fair determination of the proceeding.

(2) Either that the customer cannot afford to pay the costs of effective participation, including advocate's fees, expert witness fees and other reasonable costs of participation and the cost of obtaining judicial review, or that, in the case of a group or organization, the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding.

(g) "Substantial contribution" means that, in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer.

1803. The commission may award reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of participation or intervention in a hearing or proceeding for the purpose of modifying a rate or establishing a fact or rule that may influence a rate to any customer who complies with Section 1804 and satisfies all of the following requirements:

(a) The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the commission's order or decision.

(b) Participation or intervention without an award of fees or costs imposes a significant financial hardship.

1804. (a) A customer seeking an award under this article shall file, within 30 days of the first prehearing conference or within 45 days after the close of the evidentiary record, and serve on all parties to the hearing or proceeding, a request for finding of eligibility for compensation. In cases where no prehearing conference is scheduled or where the commission anticipates the proceeding will take less than 30 days, the commission may determine the procedure to be used for filing these requests. The request shall include all of the following:

(1) A showing by the customer that participation in the hearing or proceeding would pose a significant financial hardship.

(2) A statement of issues the customer intends to raise in the hearing or proceeding.

(3) An estimate of the compensation that will be sought.

(4) A budget for the customer's presentation.



Within 30 days after service of the request for a finding of eligibility for compensation, the commission may direct its staff to file, and may permit any other interested party to file, a statement responding to the request, including a discussion of the appropriateness of a common legal representative.

(b) The commission shall thereafter issue a ruling determining whether the customer is eligible for an award of compensation. The ruling shall address whether a showing of significant financial hardship has been made and may include a discussion of whether it is determined appropriate to designate a common legal representative pursuant to Section 1805.

(c) Following issuance of a final order or decision by the commission in the hearing or proceeding, a customer who has been found by the commission, pursuant to subdivision (b), to be eligible for an award of compensation may file within 30 days a request for an award. The request shall include, at a minimum, a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding. The request shall be served on all parties to the hearing or proceeding. Within 30 days after service of the request, the commission staff may file and any other party may file, a response to the request.

(d) The commission may audit the records and books of the customer to the extent necessary to verify the basis for the award. The commission shall preserve the confidentiality of the customer's records in making its audit. Within 20 days after completion of the audit, if any, the commission shall direct that an audit report shall be prepared and filed. Any other party may file a response to the audit report within 20 days thereafter.

(e) Within 75 days after the filing of a request for compensation pursuant to subdivision (c), or within 50 days after the filing of an audit report, whichever occurs later, the commission shall issue a decision that determines whether or not the customer has made a substantial contribution to the final order or decision in the hearing or proceeding. If the commission finds that the customer requesting compensation has made a substantial contribution, the commission shall describe this substantial contribution and shall determine the amount of compensation to be paid pursuant to Section 1806.

1805. The commission may, as specified in Section 1804, designate, if determined appropriate, a common legal representative. In cases where the commission designates a common legal representative, no compensation shall be awarded to customers with the same or similar interests who participate or intervene in the hearing or proceeding.

1806. The computation of compensation awarded pursuant to Section 1804 shall take into consideration the compensation paid to persons of comparable training and experience who offer similar services. The compensation awarded may not, in any case, exceed the market value of services paid by the commission or the public utility, whichever is greater, to persons of comparable training and experience who are offering similar services.

1807. Any award made under this article shall be paid by the public utility which is the subject of the hearing, investigation, or proceeding as determined by the commission, within 30 days. Notwithstanding any other provision of law, any award paid by a public utility pursuant to this article shall be allowed by the commission as an expense for the purpose of establishing rates of the public utility by way of a dollar-for-dollar adjustment to rates imposed by the commission immediately on the determination of the amount of the award, so that the amount of the award shall be fully recovered within one year from the date of the award.

1808. The commission shall deny any award to any customer who attempts to delay or obstruct the orderly and timely fulfillment of the commission's responsibilities.



**APPENDIX L**

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**Decision 84-10-062 October 17, 1984**

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

| | |
|---|---|
| COMMITTEE OF MORE THAN 1 MILLION CALIFORNIA TAXPAYERS TO SAVE PROP. 13, a nonprofit tax-exempt organization,<br>*Complainant,*<br><br>v.<br><br>PACIFIC GAS & ELECTRIC COMPANY, a California corporation; SAN DIEGO GAS & ELECTRIC COMPANY, a California corporation; SOUTHERN CALIFORNIA EDISON COMPANY, a California corporation; SOUTHERN CALIFORNIA GAS COMPANY, a California corporation; GENERAL TELEPHONE COMPANY OF CALIFORNIA, a California corporation; and PACIFIC BELL, a California corporation,<br>*Defendants.* | **Case 84-10-022 (Filed October 4, 1984)** |

### ORDER DISMISSING COMPLAINT

On October 4, 1984, the Committee of More Than One Million California Taxpayers to Save Prop. 13 (Committee) filed a complaint requesting access to the extra space in the billing envelopes of the major California energy and telephone

utilities pursuant to Decision (D.) 93887 (as modified by D.82-03-047) and a motion for an ex parte order granting immediate and urgent relief or, in the alternative for a shortening of time for hearing on the complaint.

The Committee states that it is informed and believes that the utility Defendants are members of either the California Round Table or the California Taxpayers Association, both of which are lobbying and/or political action groups consisting of various businesses in California, and that each of these associations has recently adopted resolutions to assess from its members and expend from such assessments substantial sums in opposition to the passage of Proposition 36. The Committee alleges, also on information and belief, that defendants will contribute funds seeking the defeat of Proposition 36, and that these funds are acquired from the monies received from ratepayers by defendants. The Committee is further informed and believes a principal argument to be propounded by the associations is that, if Proposition 36 is passed, it will result in an unreasonable limitation on the ability of public utilities to set rates necessary to meet ongoing variable expenses. The Committee opposes this argument.

The Committee asserts that defendants send a monthly bill packet by first class mail to each of their utility customers. The weight of the bill packet, which includes the mailing envelope and any required legal notices mailed with the bill, is less than one ounce. Because postage is charged in one ounce increments, the difference between the actual weight of the bill packets and the measure of one full ounce constitutes an additional measure of weight or "extra space" in the envelope which may be used at no additional postage charge.

The Committee alleges that defendants presently include inserts of their own in the "extra space" available in the billing envelopes but fail to make it available to ratepayers as required by D.93887 and D.82-03-047.

The Committee alleges that a substantial number of its supporters are ratepayers of the defendants and that all ratepayers of each of the defendants would benefit from accurate information on the possible effects of Proposition 36 on utility rates and services.



The Committee argues that it should be allowed to include informational inserts for the benefit of defendants' ratepayers in the billing envelopes of all defendants which would provide this assessment of the potential effects of Proposition 36 on utility rates. Since supporters of the Committee, who are ratepayers, are the source of the funds which Committee believes will be used to contribute to the campaign in opposition to Proposition 36, Committee should be permitted to use the "extra space" belonging to these ratepayers to counter the political contributions of defendants.

Since the election, in which Proposition 36 will be decided by the voters, takes place on November 6, 1984, Committee asks that defendants be ordered to allow the inserts in this month's (October's) billing envelopes.

Notice of the filing of this complaint appeared on the Commission's Daily Calendar of October 11, 1984. Under ordinary procedures, we would wait at least 30 days to receive answers from each of the defendants and to determine whether there were other parties whose intervention might prove useful in rendering an informed decision on the complaint. However, because of the shortness of time before the election, and so that Committee might know where it stands with respect to its complaint and can redirect its resources accordingly, we are taking the unusual step of dismissing the complaint without waiting for defendants' answers.

**Discussion**

Because we are complying with the Committee's request for "immediate and urgent action," we do not have the usual benefit of an evidentiary record or defendants' response to the complaint. We are forced in this instance to evaluate the Committee's complaint on its face.

The Committee relies primarily on our invitation in D.93887 (December 30, 1981) for proposals for using "the economic value of the 'extra space' more efficiently for ratepayers' benefit." The Committee proposes that ratepayers will benefit sufficiently from what the Committee asserts is accurate

information about Proposition 36 to justify including the Committee's materials in the billing envelope of defendant utilities.

Since the invitation of D.93887, however, we have acted on several proposals that have allowed us to refine our views on the appropriate use of the extra space. Our emphasis in our two subsequent decisions has been on using the extra space to improve the quality and degree of consumer participation in our hearings. In granting the Utility Consumers Action Network (UCAN) access to the envelope of SDG&E, we found that an important interest was "the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete consumer understanding possible of energy-related issues" (D.83-04-020, p.17). Similarly, we granted Toward Utility Rate Normalization (TURN) access to PG&E's envelope in part because TURN had "demonstrated in its testimony and in past participation in proceedings before this Commission an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population, (was) presently involved in Commission proceedings, (and could not) participate in all the regulatory proceedings of PG&E it might otherwise participate in without significant financial hardship" (D.83-12-047, p. 21).

Better and broader consumer participation not only serves the ideals of democratic government, but it improves the record in our proceedings. From this improved record comes more accurate fact-finding and sounder decisions, to the benefit of all ratepayers.

The Committee has not participated in our proceedings, and its complaint does not suggest that it ever will participate, apart from actions related to its complaint. Its claim to consumer representation is limited to a statement that a "substantial number" of its supporters are ratepayers.

In determining that the extra space could be used to benefit ratepayers, we did not intend to create a public forum for any group that could claim ratepayers as members. Access to the billing envelope has so far been granted only to groups organized specifically to represent ratepayers in our proceedings. While other proposals for use of the extra space may prove to have merit, we do not believe that the Committee's proposal, as set forth in its complaint, sufficiently benefits ratepayers as ratepayers to justify the order the Committee requests.[1]



This matter did not appear on our public agenda as required by the Government Code, however, a sufficient emergency exists, considering that our next regularly scheduled meeting falls after the election, to justify our action today under Public Utilities Code Section 306(b).

**Findings of Fact**

1. The complaint requests access to the extra space in utility billing envelopes for the purpose of providing information on the effects of Proposition 36 on utility rates.

2. The complaint does not allege that the Committee has participated or intends to participate in our proceedings.

3. The complaint does not allege that the Committee's use of the extra space will improve consumer participation in our proceedings.

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[1] We also note that Public Utilities Code Section 453(d) states, "No public utility shall include with any bill for services or commodities furnished any customer or subscriber any advertising or literature designed or intended . . . to promote the passage or defeat of a measure appearing on the ballot at any election . . . ." Although this statute would bar the relief sought in the Committee's complaint, *Consolidated Edison v. Public Service Commission*, 447 U.S. 580 (1980), has raised questions about the constitutionality of the statute. We therefore choose to base our dismissal of the Committee's complaint on other grounds.

**Conclusion of Law**

The complaint should be dismissed.

Therefore, IT IS ORDERED that the complaint of The Committee of More Than One Million California Taxpayers to Save Prop. 13 is dismissed.

This order is effective today.

Dated October 17, 1984, at San Francisco, California.

I will file a written concurrence.

/s/ VICTOR CALVO
Commissioner

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

I will file a written concurrence.

/s/ WILLIAM T. BAGLEY
Commissioner



COMMISSIONER VICTOR CALVO, concurring.

The reasons stated by the majority for dismissal of the complaint may be well and good, however, my concurrence with the results of this order follows a different reasoning. As I pointed out in my dissent to the order cited by the majority, I am not convinced that anyone, whether a ratepayer group or, as here, a political advocate, is entitled to invade a public utility's billing envelope to convey their messages. (See dissenting opinion of Commissioner Calvo, *Toward Utility Rate Normalization v. Pacific Gas and Electric Company*, Decision 84-05-039, Case 83-05-13, ____ CPUC ____ (1984).)

I believe other media and forums exist that are better suited to carry those messages and I believe that they should be used in favor of a utility's billing envelope. As a result, I do not examine the issue of this complainant's worthiness or intentions. I would simply dismiss the complaint because the relief requested is still at issue before us and is something I am not inclined to grant.

/s/ VICTOR CALVO
Victor Calvo
*Commissioner*

October 17, 1984
San Francisco, California

William T. Bagley, Commissioner, Concurring:

This concurrence is written in order to express my continuing disagreement with the Commission majority in *T.U.R.N. v. PG&E*, Decision 83-12-047.

In that decision, the majority (at page 23) states "It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views". As unconstitutionally presumptuous as that majority statement may be, if in fact it is valid for T.U.R.N. then it should be valid for Howard Jarvis and the petitioner herein. And if in fact T.U.R.N. has some type of "equitable property right" in the envelope space, derived through ratepayers, then perhaps so does the Committe of More Than One Million California Taxpayers to Save Prop. 13 (Committee). These people who signed the Proposition 36 petitions are California residents, voters and ratepayers.

And further, specific intervenors in P.U.C. proceedings now have the benefit of S.B. 4, (Montoya), signed by the Governor and chaptered as law this year. S.B. 4 authorizes the award of intervenor fees by the P.U.C. It thus becomes less "necessary" for intervenor organizations such as T.U.R.N. to exercise their equitable property right to use the billing envelope for fund raising purposes. That being the case, there is more relative reason to assign some of that space to organizations such as that of petitioners. Courts of Equity might so decree.

It is recognized, as stated in the *T.U.R.N. v. PG&E* dissent, that such extensions of the majority opinion will "result in a legal and administrative morass". Nonetheless, with that T.U.R.N. majority opinion before us, we cannot simply reject other applicants as is done here.

I do concur in the rejection, not on the basis stated by the majority, but because I continue to believe that any and all such assignment of envelope space by this Commission to other entities is a deprivation of the constitutional rights of the subject utility companies. The real solution, of course, is for this Commission to rescind Decision 83-12-047.

/s/ WILLIAM T. BAGLEY
William T. Bagley

October 17, 1984



**APPENDIX M**

## Article 18.5 Rules for Implementation of PURPA Section 122(a)(2)

### 76.0. (Rule 76.01) Purpose.

The purpose of this article is to establish procedures for awarding reasonable fees and costs to consumers of electric utilities pursuant to PURPA Section 122(a)(2).

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

HISTORY:

1. New Article 18.5 (Sections 76.01-76.10) filed 8-13-80; designated effective 7-27-80 by Public Utilities Commission Decision No. 91909, see Section 11445, Government Code (Register 80, No. 33).

### 76.02. (Rule 76.02) Definitions.

When used in this article:

(a) "PURPA" means Public Utility Regulatory Policies Act of 1978.

(b) "Compensation" means reasonable attorneys' fees, expert witness fees, and other reasonable costs.

(c) "PURPA position" means a factual contention, legal contention, or specific recommendation promoting one of the following PURPA purposes and relating to one or more of the following PURPA subtitle B standards:

(1) PURPA purposes:

(A) Conservation of energy supplied by electric utilities

(B) Optimization of the efficiency of use of facilities

(C) Equitable rates to electric consumers

(2) PURPA Ratemaking Standards:

(A) Cost of Service—S 111(d)(1)

(B) Declining Block Rates—S 111(d)(2)

(C) Time-of-Day Rates—S 111(d)(3)

(D) Seasonal Rates—S 111(d)(4)

(E) Interruptible Rates—S 111(d)(5)

(F) Load Management Techniques—S 111(d)(6)

(3) Other PURPA Standards:

(A) Master Metering—S 113(b)(1)

(B) Automatic Adjustment Clauses—S 113(b)(2)

(C) Information to Consumers—S 113(b)(3)

(D) Procedures for Termination of Electric Service—S 113(d)(4)

(E) Advertising—S 113(d)(5)

(d) "Consumer" means any retail electric consumer of an electric utility, any authorized representative of such a consumer, or any representative of a group or organization authorized, pursuant to articles of incorporation or by-laws, to represent the interests of consumers.

(e) "Expert witness fees" means recorded or billed costs incurred by a consumer for an expert witness with respect to a PURPA issue.

(f) "Other reasoanble costs" means reasonable out-of-pocket expenses incurred by a consumer with respect to a PURPA issue not exceeding twenty-five percent (25%) of the total of reasonable attorneys' fees and expert witness fees awarded.

(g) "Party" shall mean any interested party, respondent, utility, or Commission staff of record in a proceeding.

(h) "Proceeding" shall mean any application, case, investigation, or other procedure of the Commission related to or involving electric rates or rate design which is initiated after the date the rules herein become effective and in which a PURPA position is considered.



(i) "Reasonable fees" shall be computed at prevailing market rates for persons of comparable training and experience who are offering similar services. In no event shall such fees exceed those paid by the Commission or the utility, whichever is greater, for persons of comparable training and experience who are offering similar services.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617

HISTORY:

1. Amendment of subsection (h) filed 2-11-81; designated effective 1-6-81 by Decision No. 91909, see Section 11445, Government Code (Register 81, No. 7).

**76.03. (Rule 76.03) Consumer's Request.**

Within thirty days of the first prehearing conference in a proceeding the consumer shall file with the Commission's Docket Office and serve on the parties known or contemplated at that time a Request for Finding of Eligibility for Compensation, in compliance with rules 2, 3, 4, 6, and 7, and with an attached certificate of service by mail on appearances. In cases where no pre-hearing conference is scheduled or where the ALJ anticipates the proceeding will take less than 30 days, the ALJ shall determine the procedure to be used for filing petitions for reimbursement. In all cases, the petition for reimbursement must set forth the following:

(a) A showing that, but for the ability to receive compensation under these rules, participation or intervention in the proceeding may be a significant financial hardship for such consumer. Such showing shall include a specific budget for the representation and a summary description of the finances of the consumer which distinguishes between grant funds committed to specific projects and discretionary funds.

(b) A statement of the PURPA issues which the consumer intends to raise in the proceeding, together with a statement of the consumer's position on each such issue.

(c) A showing addressing representation of persons with the same or similar interests by a common legal representative.

(d) An estimate of the compensation to which the consumer believes it may be entitled to at any stage of the proceeding and the basis for such estimate, including a budget.

(e) For a consumer who claims to represent the interests of other consumers, a showing which includes the articles of incorporation, by-laws, membership structure, composition of Board of Directors, and newsletter circulation, if any, along with a summary description of the previous work of the consumer.

NOTE: Authority cited: Section 1701, Public Utilites Code. Reference: PL 95-617.

HISTORY:

1. Amendment filed 2-11-81; designated effective 1-6-81 by Decision No. 91909, see Section 11445, Government Code (Register 81, No. 7).

**76.04. (Rule 76.04) Showing of Other Parties.**

Except as provided by the ALJ in accordance with Rule 76.03, the Commission staff shall file with the Commission's Docket Office a statement within ten days after the consumer's filing or 30 days after the commencement of the proceeding, whichever occurs later, declaring whether it intends to take a position different from the consumer. Any other party may file comments on a consumer's request within ten days after the request is filed. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7, and be accompanied by a certificate of service on appearances by mail.

NOTE: Authority cited: Section 1701, Public Utilites Code. Reference: PL 95-617.

HISTORY:

1. Amendment filed 2-11-81; designated effective 1-6-81 by Decision No. 91909, see Section 11445, Government Code (Register 81, No.7).

**76.05. (Rule 76.05) Commission Ruling.**

At the first regularly scheduled conference after the statement of the Commission staff has been filed, the Commission shall issue a ruling as to the following items:



(a) Whether or not the consumer has met its burden of showing "significant financial hardship" pursuant to Rule 76.05(c).

(b) A designation, if appropriate, of the "common legal representative" to represent persons with the same or similar interests as provided for in PURPA Section 122(a)(2), which designation shall be binding for the remainder of the proceeding.

(c) Whether or not "Significant financial hardship" has been shown by consumers:

(1) who have, or represent, an interest

(A) which would not otherwise be adequately represented in the proceeding, and

(B) representation of which is necessary for a fair determination in the proceeding, and

(C) who are, or represent an interest which is, unable to effectively participate or intervene in the proceeding because such persons cannot afford to pay reasonable attorneys' fees, expert witness fees, and other reasonable costs of preparing for, and participating or intervening in, such proceeding (including fees and costs of obtaining judicial review of such proceeding).

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

(2) who, in the case of a group or organization, demonstrate that the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding. Such showing shall constitute a prima facie demonstration of need as required by Rule 76.05(c)1(C).

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

**76.06 (Rule 76.06) Compensation Filings of Consumer.**

Following issuance of a Commission order or decision during a proceeding pursuant to Rule 76.05 a consumer may file a request for compensation with the Docket Office. The filing shall comply with Rules 2, 3, 4, 6, and 7, and shall have a certificate of service by mail on appearances attached. Such request shall include a detailed description of hourly services and expenditures or invoices for which compensation is sought. To the extent possible, this breakdown of services and expenses should be related to specific PURPA issues. The request shall also describe how the consumer has substantilly contributed to the adoption, in whole or in part, in a Commission order or decision, of a PURPA position advocated by the consumer related to a PURPA standard. "Substantial contribution" shall be that contribution which, in the judgment of the Commission, substantially assists the Commission to promote a PURPA purpose in a manner relating to a PURPA standard by the adoption, at least in part, of the consumer's position. A showing of substantial contribution shall include, but not be limited to, a demonstration that the Commission's order or decision has adopted factual contention(s), legal contention(s), and/or specific recommendation(s) presented by the consumer.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

HISTORY:

1. Amendment filed 2-11-81; designated effective 1-6-81 by Decision No. 91909. see Section 11445, Government Code (Register 81, No. 7).

**76.07. (Rule 76.07) Staff Audit of Consumer's Records.**

At the direction of the Commission, the Commission staff may audit the records and books of the consumer to the extent necessary to verify that compensation sought is reasonable. Within twenty days after completion of the audit, if any, an audit report shall be filed with the Commission.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.



**76.08. (Rule 76.08) Commission Decision.**

Within 30 days of the filing of a request for compensation or within 20 days after the filing of the staff audit report, if any, the Commission shall issue a decision describing the contribution found to have been made and the compensation awarded.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

**76.09. (Rule 76.09) Payment of Compensation.**

The electric utility shall pay any award of compensation to the consumer within 30 days after the Commission's decision is issued, unless a timely application for rehearing with respect to the issue of compensation is filed, in which case no payment will be required until an order denying rehearing or an order after rehearing is issued.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

**76.10. (Rule 76.10) Consumer Request After Hearings Commence.**

(a) A consumer who has not requested a finding of eligibility for compensation pursuant to Rule 76.03 may make such a request after hearings have begun. Such request shall not be granted unless all the requirements of Rule 76.03 are met and the consumer can demonstrate that absent participation by the consumer, an important issue relating to a PURPA standard has not or will be adequately considered in the proceeding. In no event may such a request be filed after Day 110 in an electric rate case subject to the Regulatory Lag Plan as adopted by Resolution No. M-4706 (adopted June 5, 1979).

(b) A request pursuant to this Rule shall be filed within five days of the date of the appearance by the consumer in the proceeding. Any comment by the staff or any party, in the nature of that described in Rule 76.04, shall be filed within five working days of the consumer's request. A ruling in the nature of that described in Rule 76.05 shall at the first regularly scheduled conference after the filing of the consumer's request. All filings pursuant to this Rule shall comply with Rules 2, 3, 4,

6, and 7 and shall have a certificate of service on appearances by mail attached.

NOTE: Authority cited: Section 1701, Public Utilities Code. Reference: PL 95-617.

**76.11. Provisions for Reimbursement.**

For cases which were pending on the date these rules became effective, where the rules concerning time for filing requests for eligibility and reimbursement, the time for filing responses thereto, and time for a Commission decision thereon cannot be met, parties may file requests for reimbursement in compliance with all of the remaining rules. Such requests must be filed within 60 days of the date the order adopting this rule is made effective. The Commission will consider all such requests on an individual basis. The exception established by this rule is not applicable to cases in which a decision on the relevant PURPA issue or issues was issued prior to July 28, 1980.

NOTE: Authority and reference cited: Section 1701, Public Utilities Code; Stats. 1947, Ch. 1425.

HISTORY:

1. New section filed 2-11-81; designated effective 1-6-81 by Decision No. 91909, see Section 11445, Government Code (Register 81, No. 7).

## Article 18.6 Procedure for Awarding Compensation to Public Participants in Commission Proceedings

**76.21. (Rule 76.21) Purpose.**

The purpose of this article is to establish procedures for awarding reasonable fees and costs to participants in proceedings before this Commission.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

HISTORY:

1. New Article 18.6 (Sections 76.21-76.32) filed 5-5-83; designated effective 5-6-83 pursuant to Government Code Section 11351 (Register 83, No. 19).



**76.22. (Rule 76.22) Definitions.**

(a) "Compensation" means reasonable advocate fees, expert witness fees, and other reasonable costs.

(b) "Issue" means an issue relating to the rates, charges, service, facilities, practices, or operations of one or more of the public utilities of this State that are regulated by this Commission.

(c) "Position" means a factual contention, legal contention, or specific recommendation by a party relating to an issue to be addressed in a Commission proceeding.

(d) "Participant" means any individual, group of individuals, organization, association, partnership, or corporation taking part or intending to take part in a Commission proceeding. For the purpose of these rules the term participant does not include governmental entities.

(e) "Expert Witness Fees" means recorded costs incurred in connection with a commission proceeding by a participant with respect to an issue and confirmed by the Commission to be reasonable.

(f) "Other Reasonable Costs" shall include out-of-pocket expenses incurred by the participant with respect to an issue but shall not normally exceed 25% of the reasonable advocate fees and expert witness fees awarded. The burden of establishing that any costs incurred were reasonable is on the participant.

(g) "Party" means any interested party, respondent, utility, complainant, protestant, or Commission staff of record in a proceeding.

(h) "Proceeding" means any application, case, investigation, rulemaking, or other formal matter before the Commission.

(i) "Reasonable Fees" means fees recorded by the participant in support of its participation in a proceeding. Reasonableness shall be computed at the prevailing market rates for persons of comparable training and experience who are offering similar services. In no event shall such fees (as

distinguished from employee salaries) exceed those paid by the Commission or the utility, whichever is greater, for persons of comparable training and experience who are offering similar services.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

**7623. (Rule 76.23) Participant's Request.**

As soon after the commencement of a proceeding as is reasonably possible, but in any event before the beginning of evidentiary hearings the proceeding, or after evidentiary hearings are completed, the participant shall file with the Commission's Docket Office and serve on all the parties to the proceeding a Notice of Intent to Claim Compensation, in compliance with Rules 2, 3, 4, 6, and 7 and with an attached certificate of service by mail on appearances. In all cases, the Notice of Intent must set forth the following:

(a) A showing that, but for the ability to receive compensation under these rules, participation or intervention in the proceeding may be a significant financial hardship for such participant. Such showing should address the factors set forth in Rule 76.25(a) (1) or (2). A summary description of the finances for the participant should distinguish between grant funds committed to specific projects and discretionary funds. If the Commission has determined that the participant has met its burden of showing financial hardship previously in the same calendar year, participant shall make reference to that decision by number to satisfy this requirement.

(b) In every case, a specific budget for the participation shall be filed showing the total compensation which the participant believes it may be entitled to the basis for such estimate, and the extent of financial commitment to the participation. If at any time during the proceeding changes in the issues, scope, or positions of parties cause a fluctuation of more than 20%, plus or minus, in the estimated budget, the participant shall file an amended budget and serve it on all parties.



(c) A statement of the nature and extent of planned participation in the proceeding as far as it is possible to set it out when the Notice of Intent to Claim Compensation is filed.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

**76.24. (Rule 76.24) Showing of Other Parties.**

The Commission staff and any other party to the proceeding may file a statement within 15 days after the participant's filing commenting on any portion of that filing and making appropriate recommendations to the Commission. The filings under this Rule shall comply with Rules 2, 3, 4, 6 and 7 and be accompanied by a certificate of service by mail on appearances.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

**76.25. (Rule 76.25) Commission Ruling.**

Within 45 days after the comments of staff and other parties are due, the Commission shall issue a decision ruling on:

(a) Whether the participant has met its burden of showing significant financial hardship in this proceeding or in a prior proceeding in the same calendar year. This can be shown by participants:

(1) Who have, or represent an interest:

(A) Which would not otherwise be adequately represented in the proceeding, and

(B) Whose representation is necessary for a fair determination in the proceeding, and

(C) Who have, or represent an interest but are unable to participate effectively in the proceeding because such person(s) cannot afford to pay reasonable advocate fees, expert witness fees, and/or other reasonable costs of preparing for, and participating in such proceeding (including fees and costs of obtaining judicial review of such proceeding), or

(2) Who, in the case of a group or organization, demonstrate that the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding. Such showing shall constitute a prima facie demonstration of need as required by Rule 76.25(a)(1)(C).

The Commission may also point out similar positions, areas of potential duplication in showing, unrealistic expectations for compensation, and any other matter of which it is aware which would affect the participant's ultimate claim for compensation. Failure of the Commission to point out similar positions or potential duplication or any other potential impact on the ultimate claim for compensation shall not imply approval of any claim for compensation. A finding of significant financial hardship in no way ensures compensation.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

**76.26. (Rule 76.26) Compensation Filings of Participant.**

Within 30 days following the issuance of a Commission order or decision for which a ruling under Rule 76.25 has been made, a participant may file a request for compensation with the Docket Office. The filing shall comply with Rules 2, 3, 4, 6, and 7 and shall have attached a certificate of service by mail on appearances. Such a request shall include a detailed description of hourly services and expenditures or invoices for which compensation is sought. This breakdown of services and expenses shall be related to specific issues. The request shall also describe how the participant has substantially contributed to the adoption, in whole or in part, in a Commission order or decision, of an issue. In order to be eligible for compensation, a participant must raise a different issue, present or elicit new or different evidence, raise new or different arguments in support of a position or take a different position from that of the staff and any other party.

In proceedings where some or all of the relief sought by a participant is obtained without a Commission order or decision



the participant may be entitled to compensation by clearly establishing a casual relationship between its participation and such relief.

"Substantial contribution" shall be that contribution which, in the judgment of the Commission, greatly assists the Commission to promote a public purpose in a matter relating to an issue by the adoption, at least in part, of the participant's position. A showing of substantial contribution shall include, but need not be limited to, a demonstration that the Commission's order or decision has adopted factual contention(s), legal contention(s), and/or specific recommendation(s) presented by the participant. A showing should also include an analysis of other factors which may affect the appropriate amount of the award. These factors include, but are not necessarily limited, to the following:

1. Time and labor expended in the participation.
2. The novelty and difficulty of the issues presented.
3. The skill required to participate effectively.
4. The preclusion of other employment due to participation in this matter.
5. The customary fee.
6. Whether the fee is fixed or contingent.
7. Time constraints imposed by the proceeding.
8. The amount involved and the results obtained.
9. The experience, reputation, and ability of the participants.
10. Awards in similar cases.

**76.27. (Rule 76.27) Staff Audit of Participant's Records.**

At the direction of the assigned ALJ, the Commission staff may audit the record and books of the participant to the extent necessary to verify the compensation sought is reasonable. Within 20 days after completion of the audit, if any, an audit report shall be filed with the Commission and served on all parties.

In addition to, or in lieu of an audit, the ALJ may request additional information from the participant in order to clarify or substantiate the amount of the compensation.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

**76.28. (Rule 76.28) Protests.**

Within 30 days of the filing of a request for compensation or within 20 days after the filing of the staff audit, if any, whichever is later, the Commission staff or any other party may file a protest with the Commission's Docket Office. The filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and be accompanied by a certificate of service by mail on parties.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

**76.29. (Rule 76.29) Commission Decision.**

As soon after the filing of a request for compensation or as soon after the filing of an audit report or protests, if any, as is reasonably possible, the Commission shall issue a decision describing the contribution found to have been made by the participant and the compensation to be awarded. The decision shall specify the basis for finding a substantial contribution and for setting the attendant award of compensation.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

**76.30. (Rule 76.30) Payment of Compensation.**

(a) The utility shall pay any award of compensation to the participant within 45 days after the Commission's decision becomes effective.

(b) If additional costs are incurred as a result of an application for rehearing on the issue of compensation, the participant may file an amended claim setting forth these costs and substantiating them in the same manner as the original claim.



(c) The amount of this payment shall be assigned to a deferred expense account for recovery in the utility's next general rate case, attrition allowance, or other proceeding changing base rates. Such recovery shall be the amount authorized by the Commission for payment and shall be had without further litigation of the reasonableness of the amount. Such recovery shall not include interest.

(d) In case of an award in a proceeding involving more than one utility, payment will be made by each utility in a proportion to be determined by the Commission.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

**76.31. (Rule 76.31) Participant Request After Hearing.**

(a) A participant who has not requested a finding of eligibility for compensation under Rule 76.23 may make such a request after evidentiary hearings have begun. Such request shall not be granted unless good cause for the late request is shown and unless the requirements of Rule 76.23 are met and unless the participant can demonstrate that, absent participation by the participant, an important issue has not or will not be adequately considered in the proceeding.

(b) A request under the Rule shall be filed within five days of the date of the appearance by the participant in the proceeding. Comments by the staff or any party, in the nature of that described in Rule 76.25, shall be made within 20 days after the filing of the participant's request. All filings under this Rule shall comply with Rules 2, 3, 4, 6, and 7 and shall have attached a certificate of service by mail on parties.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

**76.32. (Rule 76.32) Provisions for Reimbursement.**

These rules will apply to issues raised subsequent to the effective date of the order promulgating these rules in any pending cases, applications, investigations, and rulemakings, and to all cases, applications, and investigations filed on or after

the effective date of the order promulgating these rules, without regard to the formal status of the matter on the effective date of these rules. A proceeding will be deemed initiated on the date an application or complaint is filed or an order instituting investigation is issued. Times for filing various requests and responses set forth in these rules shall be adhered to except that any Commission decision on the requests will be held in abeyance until these rules become effective.

NOTE: Authority cited: Section 1701, Public Utilities Code; and California Constitution, Article XII, Section 2. Reference: Decision 93724 in Application 59308.

## Article 19. Decisions and Proposed Reports

### 77. (Rule 77) Issuance of Decisions.

A proceeding shall stand submitted for decision by the Commission after the taking of evidence, and the filing of such briefs or the presentation of such oral argument as may have been prescribed by the Commission or the presiding officer.

### 78. (Rule 78) Petition for Proposed Report.

A party to a proceeding may file a petition requesting that a proposed report be issued by the presiding officer. Such petition shall be filed and called to the attention of the presiding officer before the conclusion of the hearing. The original and twelve copies of the petition shall be filed with the Commission, and the original shall show that copies have been served upon all parties to the proceeding. The petition shall set forth the reasons why it is believed that issuance of such a proposed report will promote the administration of justice and will not cause unreasonable delay in the final determination of the proceeding. Objections may be served and filed by other parties within five days after service of the petition.

### 79. (Rule 79) Proposed Reports.

Upon direction by the Commission, the presiding officer shall prepare and file his proposed report. The Secretary's office shall cause copies thereof to be served upon all parties to



the proceeding. Such proposed report shall contain recommended findings, conclusions, and order.

### 80. (Rule 80) Exceptions.

A party may serve and file exceptions to a proposed report within twenty days after service thereof. Exceptions shall be specific, and stated and numbered separately. Exceptions to factual findings shall specify the portions of the record relied upon; proposed substitute findings; and proposed additional findings, with supporting reasons. Exceptions to conclusions shall cite statutory provisions or principal authorities relied upon; proposed substitute conclusions; and proposed additional conclusions.

### 81. (Rule 81) Replies to Exceptions.

Replies may be served and filed within fifteen days after service of exceptions.

### 81.5. (Rule 81.5) Commission Meetings.

Commission meetings shall be held on a regularly scheduled basis for the purpose of considering and signing decisions and orders and taking such other action as the Commission deems appropriate. The time and place of these meetings will appear daily in the Commission calendar at least three weeks in advance. The meetings are open to the public. An agenda of the meeting is available from the Secretary on request. No unscheduled meeting to take action shall be held, and no matter not on the agenda of a meeting shall be decided, unless there is a determination by the Commission of an unforeseen emergency condition.

Unforeseen emergency condition is defined as a matter brought to the attention of the Commission which requires decision or action by the Commission more promptly than would be permitted if advance publication were made on the regular meeting agenda. Examples of such matters are requests for relief based on extraordinary conditions in which time is of the essence; deadlines imposed on the Commission by legislative bodies, the courts, other administrative bodies or tribunals, the office of the Governor, or a legislator; or some unusual

matter which cannot be disposed of by normal procedure if the duties of the Commission are to be fulfilled.

NOTE: Authority cited: Section 1701, Public Utilities Code.

HISTORY:

1. New rule filed 2-21-75; effective thirtieth day thereafter (Register 75, No. 8). Note: Filing states Resolution No. L-163 dated February 4, 1975, adding Rule 81.5 is effective February 4, 1975.

2. New rule refiled 2-24-75; effective thirtieth day thereafter (Register 75, No. 8). Note: Filing states Resolution No. L-163 dated February 11, 1975, adding Rule 81.5 is effective February 11, 1975.

**82. (Rule 82) Service of Orders.**

Decisions and orders shall be served by the Secretary's office by mailing copies thereof to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a copy thereof. When a party to an application proceeding has appeared by a representative, service upon such representative shall be deemed to be service upon the party.

**83. (Rule 83) Effective Date.**

Decisions and orders in complaint or investigation proceedings shall become effective twenty days after service thereof, unless otherwise provided therein. Decisions and orders in other proceedings shall become effective twenty days after issuance thereof, unless otherwise provided therein.

## Article 20. Reopening Proceedings

**84. (Rule 84) Petition to Set Aside Submission.**

After conclusion of hearings, but before issuance of a decision, a party to the proceeding may serve on all other parties, and file with the Commission, a petition to set aside submission and reopen the proceeding for the taking of additional evidence. Such petition shall specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. It shall contain a brief statement of proposed additional evidence, and explain why such evidence was not previously adduced.

EDITOR'S NOTE

PAGES A-183 THRU END WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

DECEMBER 1984 APPENDIX N

# PG&E Progress



## *Holiday Greetings . . .*

*. . . from the men and women of PG&E, who work to bring you gas and electric service, in all weather and all seasons. But it is during this season in particular that we welcome the chance to express our thanks for the privilege of serving you, our friends and neighbors.*

## CPUC Increases Baseline Quantities

Baseline winter and summer quantities for many PG&E customers have been increased by the California Public Utilities Commission (CPUC).

The new higher quantities went into effect November 15. They will mean savings on energy bills for many customers.

Baseline, like the Lifeline system it replaced in May, provides basic amounts of energy at minimum rates.

Winter gas Baseline quantities were increased for all PG&E customers. Many winter all-electric quantities were raised as well. (If you have an electric water heater you have been reclassified as an all-electric customer.)

The proposal to raise Baseline quantities was submitted jointly by PG&E and the

*Continued on page 8*

# Automatic Payment, Balanced Payment Make Bill Paying Easier for You

You can join the thousands of PG&E customers who have their monthly energy bill payment deducted automatically from their bank, savings and loan or credit union account.

The Automatic Payment Service (APS) lets you authorize the transfer of funds from your checking or savings account to pay your PG&E bill.

You still receive a monthly statement so you can keep track of your energy use, and you have up to ten days to review the statement before the automatic payment is made.

Best of all, there is no danger that your gas and electric service would be interrupted if you should take a long business or vacation trip and miss a bill payment.

Your monthly statement from your financial institution will show the amount that has been deducted to pay your energy bill.

Another service available from some large banks and savings and loans is electronic funds transfer, using just a telephone or your home computer and a modem connected to your telephone.

Through your computer you instruct your bank to transfer funds to your PG&E account from your checking or savings account.

Although you don't get a cancelled check when you pay electronically, your payment will be noted on your PG&E bill and your financial statement each month.

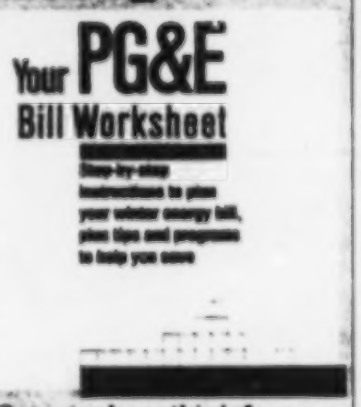
And, if seasonal weather changes or increased holiday activities cause your utility bill to jump, there's a way to even out those bills and stop the surprises. It's called the Balanced Payment Plan or BPP.

BPP evens out your annual PG&E bills so that you pay a set amount each month. You will know in advance how much you'll be paying and you can join or drop anytime.

## Plan Your Energy Bill

Plan your winter energy bill this winter. A new publication, "Your PG&E Bill Worksheet" can help.

You'll find easy step-by-step instructions to calculate your energy bill and determine which of your appliances uses the most energy.




Once you have this information, you can find ways to cut back and save on your energy bill this winter.

Just call or visit your local office for a free copy. When you complete the worksheet and return the reply card, PG&E will send you a special Energy 1985 calendar that's filled with energy tips to help you save year round.

When you sign up for BPP, the company analyzes your gas and electric use during the past year to calculate what you will be paying this year.

If you've had service for less than a year, you can still join. PG&E uses a formula based on energy use of customers on the same rate schedule.

Once your average yearly bill has been determined, it is divided into 12 even payments. That's the balanced amount you'll pay each month.

Your meter is read regularly and each bill tells you how much gas and electricity you used the previous month. The bill also tells you how much you would owe for the month if you weren't on the plan.

Your account is reviewed every four months. Of course, the amount of energy you use this year won't be exactly the same as last year because of variations in weather patterns, the addition of new appliances and your own conservation efforts. All this is considered when your account is reanalyzed.

At the end of a year, you'll receive an adjusted bill that will reflect any overpayment or underpayment on your BPP account.

If PG&E owes you more than $10, you will receive a check. If it's less we will apply it to your account.

And if you have underpaid, that amount will be indicated on your adjustment bill.

Applications for these convenient services are available at all PG&E offices or by calling your local service representative at the telephone number listed on your bill.



# Letters From Customers

Earlier in the year there was a short item in Progress on plastic window coverings. Many customers wrote for more information.

**Could you possibly give me some more information on those plastic window coverings you wrote about earlier this year. I went to my local hardware store and they didn't know much about them.**

**—San Francisco**

We went to our technical experts for more information on these window coverings. Here's what they had to say.

You may want to visit a large hardware or home improvement store and ask if they have plastic storm window kits or window insulator kits. These products are intended to do more or less the same thing as storm windows, but at a lower price.

Because of the ease of handling, most of these new products are plastic. They are usually designed to be installed on the inside of the home, so they are sometimes referred to as plastic interior storm windows.

Unlike plastic films that are affixed directly to the existing glass, these plastic coverings leave an air space between the glass and the plastic, which helps reduce heat loss.

The least expensive brands have thinner plastic, usually secured directly to the frame, and are more or less permanently installed—so you wouldn't be able to open the window if you use this type. At least one brand of this type shrinks taut when heated with a hair dryer, to give an undistorted view.

The very thin plastic, however, offers practically no resistance to heat radiation and so allows more heat loss from your home than do some of the thicker plastics or glass. The thin plastic could help reduce drafts or infiltration, but it won't be as good as a glass storm window. Also, sharp objects could puncture the thin plastic.

Most of the thicker plastic storm windows come with some sort of plastic frame, attached to the window frame by various means such as magnets which allow easier removal and reinstallation. So you could remove this type to open the window. Because of the heavier plastic and the frames, though, they are more expensive than the others, but are probably more durable. Also, their higher resistance to heat radiation makes them more energy-efficient. On the other hand, they are not as clear as glass, so they may detract from your view.

Before you invest in plastic window covers you should request a free PG&E home energy audit. The auditor can suggest ways to save energy based on your home and lifestyle. Call your local PG&E office to make an appointment.

Send your questions and concerns to:
Kathy Hyams
Room 1770, 77 Beale St.
San Francisco, CA 94106

**A PICTURE FROM THE PAST: The equipment for laying gas pipelines wasn't quite as sophisticated in 1929 as it is now. But the end result was the same then as it is today—reliable and safe gas service. The two men shown here were working in the Kettleman Hills area near Coalinga on a cold November day.**

# PG&E Works to Safeguard Bald Eagle Nesting Area

Bald eagles in the Pit River area of Northern California have a friend in PG&E. The company, cooperating with state and federal agencies, is working to help them prosper.

The Pit River area boasts the densest nesting population of these great birds in California.

Eight pairs of bald eagles, almost 15 percent of the breeding population in California, make their home in the area where PG&E has several hydroelectric powerhouses.

PG&E is working in conjunction with state and federal agencies in a two-year study of the bald eagles in the Pit River area.

Study results will help PG&E and resource agencies manage and improve wildlife habitat and safeguard the eagles.

The bald eagle, America's national bird, is an endangered species. There are hopeful signs, however, that their number is increasing in California.

"We're finding out what they eat, how they catch their food and the effects of the environment on the birds," says Mark Jenkins, a PG&E wildlife biologist.

Parts of the study have to be done in the eagles' own nest, which generally sits high up in a tree.

A brave biologist suits up in protective clothing, ties a rope ladder to the tree and climbs one hundred dizzying feet up to the nest.

He gently lifts a young eagle from the nest and lowers it in a basket to a ground team below.

The researchers carefully remove the young bird from the basket and cover its head with a hood to keep it from panicking.

The nestling is then weighed, measured and fitted with a tiny radio transmitter so biologists can keep track of its movements. The transmitter is designed to fall off after a month.

Then the young bird is carefully placed back in the nest by the biologist.

Biologists also collect bones and other material left of the forest creatures that became earlier eagle dinners.

"This collection helps us learn more about the birds' diet," says Jenkins.

Bald eagles primarily eat fish but they also eat waterfowl in the fall and winter when they pass through the state during migration.

Since fish are the mainstay of the bald eagles' diet, another part of the study traces the movement of fish through the Pit River system.

Fish are trapped, radio-tagged and later tracked so that PG&E can better understand the relationship between eagle and fish.

One winter day the researchers watched in awe as a group of 11 eagles eyed the fish in the water. Periodically the birds would snatch fish from the water's surface and devour them.

"In 1983, the eagles raised in the Pit River area raised ten young," says Jenkins. "This is more than in previous years."

Other bald eagles from Alaska, British Columbia and Washington stop in this area during their migration.

Results of the study, which ends next year, will go into a long-range management plan to help protect fish and bald eagle populations for many years to come.

**In the Pit River area, which boasts the densest nesting population of bald eagles in California, biologists place tiny radio transmitters on young eagles to collect data on this endangered species.**

# Make-Ahead Festive Holiday Brunch

How about a festive brunch during the holiday season for family or special friends? The casserole and cake can be prepared the day before and baked just before serving.

To make preparation day easier, the chicken can be cooked ahead of time or you can used canned chicken.

Serve with fresh fruit such as pineapple, pears, apples, grapes, oranges, grapefruit or kiwi.

## Holiday Cake/Bread

- 4½ to 5 cups unsifted flour*
- 2 packages active dry yeast
- ½ cup sugar
- 1 teaspoon salt
- ½ cup butter or margarine (room temperature)
- 1½ cups very hot tap water
- 2 eggs
- ¼ cup diced candied red cherries
- ¼ cup diced candied green pineapple
- ¼ cup seedless raisins
- 1 cup coarsely chopped walnuts

In large mixer bowl, combine 2 cups flour, yeast, sugar and salt, mixing well. Add butter; with mixer at low speed, cut butter into flour mixture.

*Note: use "bread" flour, preferably; otherwise, use all-purpose.

Add hot water, all at once, and beat on medium speed for 2 minutes, scraping bowl occasionally. Add eggs and 1 cup flour, mixing well. Remove beaters. With wooden spoon, stir in cherries, pineapple, raisins and nuts. Add about 1½ cups more flour or enough to make a stiff dough that you can knead. Spoon into a well-greased 10-inch bundt pan (or angel cake pan). Cover tightly with plastic wrap which has been greased generously. (Dough will rise against plastic.) Cover with foil and store overnight in refrigerator. To bake: remove foil and plastic wrap, then cover loosely with foil. Let stand at room tem-

perature for 1 hour. Remove foil and bake along with Chicken 'en Casserole in 350° oven (cold start) for 50 to 60 minutes, or until deep brown on top. Turn out on rack to cool. While warm, sprinkle with powdered sugar, or drizzle frosting over all and decorate as desired with whole pecans or almonds and green and red candied fruit. Serve warm.

Powdered Sugar Frosting: Combine 1 cup sifted powdered sugar, ½ teaspoon vanilla and 1 to 1½ tablespoons light cream, mixing well. Drizzle over cake/bread.

## Chicken Casserole

- 1 3-pound chicken (about), cut up
- Onion, carrot, celery, parsley
- Salt and pepper
- Water
- 1¼ cups raw long grain rice, or half wild rice and long grain
- 6 sliced low-fat bacon
- 2 tablespoons sliced green onion
- 1 10½ ounce can cream of chicken soup
- ¼ cup milk
- 2 tablespoons chopped fresh parsley
- 1 tablespoon cooking sherry, optional
- 1 tablespoon lemon juice
- 2 tablespoons grated Parmesan cheese

Place chicken in large saucepot. Add 1 onion, 1 stalk celery, 1 carrot, springs of parsley, salt and pepper to taste. Cover chicken with water. Bring to boil, then simmer about 1 hour or until fork tender. Let chicken cool in liquid. Remove meat from bones. Reserve broth. Measure 2½ cups broth into saucepan; bring to boil. Add rice and simmer until tender, about 25 minutes. Turn cooked rice into buttered 1½-quart baking dish. Layer chicken pieces over rice. Meanwhile, cook bacon until crisp; drain and chop. Reserve 1 tablespoon bacon fat in skillet; add onion and saute until limp. Combine soup, onion, milk, parsley, sherry and lemon juice, mixing well. Pour over chicken and rice. Layer Parmesan cheese and bacon over top. Cover tightly and store in refrigerator. To bake: cover loosely with foil and bake along with Holiday Cake/Bread in 350° oven (cold start) for 50 to 60 minutes, or until heated through. Makes 6 to 8 servings.



# How to Weatherstrip Your Home this Winter

Don't underestimate those small cracks around doors and windows. Many small air leaks can add up to make your house drafty and uncomfortable and add to your energy bill.

**Door Weatherstripping**
There are two basic kinds of weatherstripping for doors. One is used around the door frame, the other is used at the base of the door.

Door frame weatherstripping fits around the sides and top of your doors. It is made from several different materials and comes in many different sizes and shapes. It can be installed outside the door on the door frame or between the door and the frame.

Outside-the-frame weatherstripping comes in vinyl or metal and wood in combination with other materials. It is generally referred to as gasket weatherstripping.

Inside-the-frame weatherstripping can be spring metal stripping, v-shaped cushion metal stripping or interlocking metal strips which require mounting on both the door and the door frame.

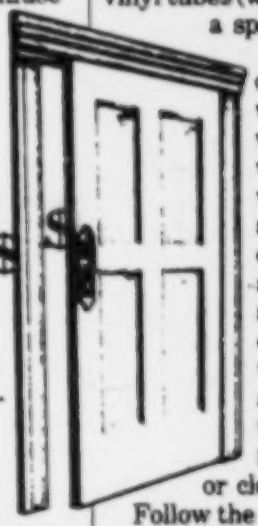
Doorsill weatherstripping, which is fastened to the bottom of the door or the threshold, comes in several forms.

You can choose spring metal, interlocking metal strips, metal and plastic door shoes, flap seals or automatic door bottoms which are installed on the base of the door.

Or you can choose vinyl bubble gaskets or threshold-mounted metal as well as special thresholds which work in combination with base-of-door devices.

This is not meant to confuse you, but to indicate the wide choice of weatherstripping materials available for doors.

Look at the cost, consider the physical appearance, the durability and the installation skills required for each type of weatherstripping. Once you determine the style and material that is best for you, follow the manufacturers instructions care fully to assure the installation will keep out the wind and cold.



**Window Weatherstripping**
All windows—especially those in older homes—should be weatherstripped. You can buy weatherstripping by the length or in complete kits. What you use and how you use it depends on the kind of windows you have.

Double hung windows which slide past each other to open and close, can be weatherstripped with spring metal or vinyl tubes (with or without a sponge core).

Casement, jalousie and awning windows can be weatherstripped with transparent vinyl tape that slips over their edges, or with a special aluminum strip made specifically for casement windows. Both are designed so they won't interfere with opening or closing the windows.

Follow the manufacturers' installation instructions for the most professional and effective job. Be sure you get gasket to gasket contact on all weatherstripping.

While you're at it, check the glazing compound around every window. Loose-fitting panes can be as costly as loose-fitting windows.

# If You Have a Generator, PG&E Needs to Know

For safety reasons and to protect your equipment, PG&E needs to know if you have installed your own electric generator as an auxiliary power source.

Without this knowledge, your equipment could be damaged. Also, PG&E linemen need to take certain precautions to protect themselves from possible electric contact.

If you have an electric generator at your home or place of business, please fill out the coupon below and send it with your bill. Or call or write your local PG&E office.

NAME _____

TELEPHONE NUMBER _____

GENERATOR LOCATION _____

PG&E ACCOUNT No. (Optional) _____

## Baseline

*Continued from page 1*

CPUC staff in response to customer concerns.

Here is a table with the old and new Baseline gas and electric quantities for each Baseline geographic territory. (Your Baseline geographic territory is shown on your bill under a dark blue heading called "rate schedule.") Remember, the Baseline electric quantities were increased only for all-electric customers.

For many customers the initial Baseline quantities were much lower than the former Lifeline allowances. Consequently, some customers experienced sizeable bill increases even though there had been no overall net change in PG&E revenues.

The new higher Baseline quantities are intended to adjust Baseline quantities to counteract large bill increases due only to the change to the Baseline system.

"Large bill increases were not contemplated by the State Legislature when it enacted the legislation that created Baseline," says Steve Reynolds, vice president-Rates.

Baseline quantities were developed in a manner consistent with the legislation that created Baseline. PG&E and the CPUC, however, felt that steps had to be taken to ensure that no customers experience large bill increases due to strict interpretation of the legislation. The recent CPUC action is the first step in this process.

All Baseline quantities will be studied by both PG&E and the CPUC as part of PG&E's next general rate case.

| Baseline Territory | ALL-ELECTRIC (Kwh) Present Quantity | ALL-ELECTRIC (Kwh) New Quantity | GAS (Therms) Present Quantity | GAS (Therms) New Quantity |
|---|---|---|---|---|
| **Winter** | | | | |
| T | 850 | 960 | 69 | 72 |
| V | 1100 | 1160 | 67 | 96 |
| W | 1000 | 1000 | 70 | 71 |
| X | 1000 | 1190 | 75 | 96 |
| R | 1200 | 1200 | 75 | 96 |
| S | 1200 | 1200 | 75 | 96 |
| Y | 1200 | 1280 | 62 | 107 |
| Z | 1400 | 1450 | ** | ** |
| **Summer** | | | | |
| T | 390 | 620 | 27 | 40 |
| V | 540 | 740 | 25 | 51 |
| W | 800 | 800 | 18 | 18 |
| X | 400 | 400 | 20 | 20 |
| R | 740 | 740 | 20 | 20 |
| S | 660 | 660 | 20 | 20 |
| Y | 480 | 620 | 25 | 40 |
| Z | 400 | 750 | ** | ** |

**Gas not available in this area

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**Editor: Kathleen R. Hyams**
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